2010 (I) ILR-CUT- I39

I.M.QUDDUSI,ACJ & B.P.RAY,J.

AJAY KU.SETHA & MAHALAPADA GRAM
PANCHAYAT- V- STATE INFORMATION COMMISSION & ORS.*
DECEMBER 24,2009

(A)RIGHT TO INFORMATION ACT, 2005 (ACT NO. 22 OF 2005) - SEC.19(8)(b)

Imposition of penalty on the public Authority – Sufficient opportunity not provided to the public Authority to have his say – Held, commission was not right in directing the public Authority to pay compensation of Rs.3,000/-.

(Para 8)

(B)RIGHT TO INFORMATION ACT,2005 (ACT NO.22 OF 2005) -SEC.20(i).

U/s.20(i) R.I. Act, if the Central Information Commission or the State Information Commission is of the opinion that the P.I.O. without any reasonable cause refused to receive application for information or has not furnished information within the time specified U/s.7(1) shall impose penalty of Rs.250/- each day till application is received or information is furnished and total amount of penalty shall not exceed Rs.25.000/-.

In the present case the commission has directed the ex-PIO and P.I.O to pay penalty of Rs.25,000/- each i.e. in total Rs.50,000/- - Held, the matter is remanded to the commission to reconsider the quantum of penalty to be imposed.

(Para 7)

For Petitioner – M/s.Biraja Pr.Satpathy, B.K.Nayak, A.K.Sahoo & S.Pradhan.
(In both the W.P.s)

For Opp.Parties – M/s.B.Rath, J.N.Rath, S.K.Jethy, P.S.Samantara & S.K.Mishra.
(For State Information Commission in both the W.Ps)
M/s.B.C.Panda, T.K.Acharya, B.Pasayat & J.Panda,
(For O.P.5 in W.P.(C)No.2784/2008 and
For O.P.3 in W.P.(C) No.3720/2008)

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*W.P.(C) NO.2784 & 3720 OF 2008. In the matter of application under Articles 226 & 227 of the Constitution of India.

I.M.QUDDUSI,A.C.J. Since both the writ petitions have been filed against the order dated 3.1.2008 passed by the Orissa Information Commission, Bhubaneswar in Second Appeal No.50 of 2004, they were taken up together and are being disposed of by this common judgment.

2. By order dated 3rd January, 2008 passed in Second Appeal No.50 of 2007, the Orissa Information Commission imposed penalty of Rs.25,000.00 each on Ajay Kumar Setha, ex-PIO and Pravakar Nayak, PIO of Mahalpada Gram Panchayat for the delay in providing information within thrity days of the receipt of request as provided in Section 7(1) of the Right to Information

Act, 2005 to one Rabiundranth Nayak. By the said order, the Commission attracting the provision of section 19(8) of the Act directed the Public Authority, i.e. Mahalpada Gram Panchayat to pay compensation of Rs.3000.00 to the application Rabindranath Nayak within a period of 15 days from the date of the order. Being aggrieved by the aforesaid order, the ex-PIO has filed W.P.(C) No.2784 of 2008 whereas the Sarpanch, Mahalpada Gram Panchayat has filed W.P.(C) No.3720 of 2008. No challenge to the said order has been made by the other PIO.

3. Case of the ex-PIO Ajay Kumar Setha, is that while continuing as Village Agricultural Worker (V.A.W.) at Junei under O.P.3, he was appointed as the Public Information Officer (in short "P.I.O.") of Gop Block as per the provisions of Right to Information Act, 2005 (in short "the Act'). On 29..5.2006 while he was functioning as the PIO of Gop Block, one Rabindra Nath Nayak (opposite party no.5) made an application under section 6(1) of the Act before the Gram Panchayat Extension Officer, Gop Block requesting for furnishing certain information and the said application was received by the petitioner on 6.6.2006 being forwarded by the Gram panchayat Extension Officer. By order dated 6.7.2006 passed by the Deputy Director of Agriculture, Puri Range, he was transferred to Olans Farm where he joined on 11.7.2006 and in his place one Bhaskar Mohanty, VAW Erbang was kept in-charge of Junei V.A.W. Circle until further orders. Contention of the petitioner is that since he was transferred to Olans Farm which is at a distance of 15 K.M. from Gop Block just one month after the receipt of the application by him and he was not imparted with any training about the provisions of the Act, he could not furnish the information within the time he was transferred to Olans Farm. The case of the Mahalpada Gram Panchayat, the petitioner in W.P.(C) No.3720 of 2008, is that opposite party no.3 Rabindranath Nayak made the application for supply of certain information before the Gram Panchayat Extension Officer on 29.5.2006. As the said information was not supplied within the time stipulated under the Act, opposite party no.3 preferred an appeal before the Competent Authority as provided under Section 19 of the Act. On being unsuccessful in the appeal he moved the Commission in second appeal in which the Secretary of the Gram Panchayat was directed to appear before the Commission on 6.12.2007. Pursuant to the direction of the Commission, the Secretary appeared before the Commission on 6.12.2007 when he was directed by the Commission to refund Rs.383.00 deposited by opposite party no.3 on 17.10.2006 as requisite fees for supply of the information. Accordingly the Secretary refunded the amount to Rs.383.00. The Commission finally heard the matter on 3.1.2008 and without affording any further opportunity of hearing and without giving any reason has directed the Gram Panchayat to pay Rs.3000.00 to opposite party no.3 as compensation.

4. Counter affidavit has been filed on behalf of the Commission in both the cases. It has been stated therein that there is no illegality in the impugned order. The fine was imposed after considering the facts and circumstances of the case. Though adequate opportunity of hearing was provided to the petitioner Ajay Kumar Setha, he failed to file any show cause to establish that he acted reasonably and diligently and that there was sufficient cause for the delay in supplying the information. It has been further stated that the averments of the petitioner that he had not undergone any training for implementation of the provision of the Act is not correct and it is not also the duty of State Commission. The training etc. are the responsibility of the Public Authority as well as the appropriate Government. It has been further stated there in that the petitioner (PIO) has been provided reasonable opportunity of hearing before the Commission but he failed to establish existence of sufficient cause for delay. The plea of the petitioner that due to ignorance about the provisions of the Act there was delay was not considered by the Commission as a valid ground for the delay. Rejoinder has been filed by the petitioner controverting the averments made in the counter affidavit

In the counter affidavit filed on behalf of the Commission in W.P.(C) No.3720 of 2008 it has been averred that the writ petition is not maintainable; that there is no legal basis for the petitioner to challenge the impugned order and that the petitioner having admitted that the information was not furnished within the stipulated time, the plea of ignorance is not a valid defence and that the petitioner was liable to pay compensation for the delay in furnishing the information. The allegation of the petitioner that the direction for payment of compensation was given without affording further opportunity of hearing has been denied in the counter affidavit.

5. Admittedly, the application under section 6 was filed on 29..5.2006 but according to the petitioner he received the same on 6.6.2006 being forwarded by the Gram Panchayat Officer. According to section 7(1) of the Act the PIO is required to provide the information on payment of such fee as may be prescribed or reject the request for any of the reasons specified in sections 8 and 9 within thirty days from the date of receipt of request. No doubt in the writ petition the petitioner has averred that he was relieved of the charge of PIO on 7.11.2006 and the new PIO joined on 11.7.2006. It is also admitted by the petitioner that he issued letter dated 26.9.2006 to the applicant asking him to deposit the required fees which he did on 17.10.2006. The contention of the petitioner is that after his transfer in absence of the knowledge of the provisions of the Act he could not initiate any action. The contention of the petitioner that due to his transfer to Olans Farm and in absence of the knowledge of the provisions of the Act he could not initiate any action is not acceptable for the simple reason that after his

transfer he issued letter to the applicant to deposit the fees. Therefore, even after transfer he was in seisin of the matter. Fact remains that he continued as the PIO till 7.11.2006 but the information could not be furnished by that date. Therefore, he is prima facie answerable for the delay till 7.11.2006. The plea of the ex-PIO is that as no training as contemplated under sub-section(d) of section 26 was imparted to him, he being a mere village Agriculture Worker could not be able to understand the intricacies of the Act and after his transfer to Olans Farm, he could not take proper steps on the application is of no avail because ignorance of law is no excuse for any omission and commission. Being posted as the PIO the petitioner was expected to know the provisions of the Act and, therefore, he cannot be permitted to take refuge under ignorance of law. It appears from the record that the matter was taken up by the Commission on 7.9.2007 when despite notice the petitioner did not appear though the applicant, the appellate authority and other PIO appeared. Again summon was issued to the petitioner to appear on 6.12.2007 when the petitioner appeared but could not satisfactorily explained the delay caused by him. Therefore, by order dated 6.12.2007 the Commission held the petitioner prima facie responsible for 124 days of delays and the matter was posted to 3.1.2008 in order to afford another opportunity to the petitioner to explain the delay as required under section 20 of the RTI Act. Even then the petitioner did not file any written show cause on 3.1.2008 when the impugned order was passed. The order dated 6.12.2007 by which the Commission held the petitioner prima facie responsible for the delay of 124 days has not been filed nor challenged by the petitioner. In view of this, the contention of the petitioner that sufficient opportunity was not provided to him to show cause is not acceptable. The State Commission in the impugned order held that despite repeated opportunities the two PIOs failed to prove that they had acted in good faith, diligently and with a view to upholding the provision of the Act. They admitted the violation but only prayed to exonerate them by taking a lenient view. Accordingly in absence of any proof, the Commission rejected the oral submission of the PIOs to exonerate them and imposed the maximu penalty of Rs.25,000/- as prescribed under section 20(1) of the Act on each of them.

6. Section 20(1) of the Act is reproduced as under :

> "20(1) Where the Central Information Commission or the State Commission, as the case may be, at the time of deciding any complaint or appeal is of the opinion that the Central Public Information Officer of the State Public Information Officer, as the case may be, has, without any reasonable cause, refused to receive an application for information or has not furnished information within the time stipulated under sub-section (1) of Section 7 malafidely

denied the request for information or knowingly given incorrect, incomplete or misleading information or destroyed information which was the subject of the request or obstructed in any manner in furnishing the information, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees:

Provided that the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard before any penalty is imposed on him:

Provided further that the burden of proving that he acted reasonable and deligently shall be on the Central Public Information Officer or the State Public Information Officer, as the case may be."

7. The provision says that where the Central Information Commission or State Information Commission is of the opinion that the PIO refused to receive an application for information or has not furnished information within the time specified under sub-section (1) of Section 7, it shall impose a penalty of two hundred and fifty rupees each day till application is received or information is furnished, so however, the total amount of such penalty shall not exceed twenty-five thousand rupees. But the Commission has directed each of the PIOs to pay penalty of Rs.25,000.00 each for the delay in furnishing information to Rabindranath Nayak, i.e. in total Rs.50,000.00 whereas the Act postulates that the total amount of penalty shall not exceed Rs.25,000.00. Therefore, the matter needs reconsideration by the Commission.

8. W.P.(C) No.3720 of 2008 has been filed by Mahalapada Gram Pamchayat through it's Sarpanch. In the impugned order dated 3.1.2008 passed by the State Commission, while allowing the prayer for Rabindra Nath Nayak (o.p.3) for compensation, directed the Public Authority (Mahalapada G.P.) through its Sarpanch to pay a sum of Rs.3,000/- as compensation to opposite party no.3 within fifteen days from the date of receipt of that order and accordingly Sarpanch of the Mahalapada Gram Panchayat, Gop Block, Puri district was informed. Against the order of compensation, the Mahalapada Gram Panchayat has filed this writ petition for quashing of the same. It appears from the order dated 7,9,2007 that as the relevant file/records were with the Secretary of Mahalapada Gram Panchayat as is the system in all Gram Panchayats in the State, the delay was attributable to him. Hence, the Secretary, Mahalapada Gram Panchayat was noticed by the Commission to appear on 6.12.2007. On that day the Secretary appeared and the Commission directed the Secretary of the Panchayat to refund Rs.383.00 to the applicant as the information were

supplied after expiry of the stipulated period of 30 days. By that time, no application was filed by the applicant for grant of any compensation. On 6.12.2007 the matter was adjourned to 3.1.2008. From paragraph 9 of the impugned order it appears that the applicant filed petition for compensation only on 28.12.2007 which was confronted to the Secretary on 3.1.2008. It is not known whether copy of the said petition was served on the Secretary. It is not the case of the PIO that as the file/records were held up by the Secretary, there was delay in furnishing the information. In such circumstances while holding that no sufficient opportunity was provided to the Public Authority to have his say we are of the opinion that the Commission was not right in directing the Public Authority, i.e., Mahalpada Gram Panchayat to pay a compensation of R.3,000.00 to the applicant. Accordingly, we quash that part of the impugned order by which Mahalpada G.P. was directed to pay Rs.3000.00 as compensation to the applicant.

9. In the result, W.P.(C) No.3720 of 2008 is allowed and W.P.(C) No.2784 of 2008 is disposed of and the matter is remanded to the State Information Commission to reconsider the quantum of penalty to be imposed on the petitioner and the other PIO having regard to the provision quoted above. There would be no order as to costs.

Writ petition disposed of .
Writ petition allowed.

2010 (I) ILR-CUT- I45

I.M.QUDDUSI,J & SANJU PANDA,J.

RUPASHREE CHOWDHURY -V- STATE OF ORISSA & ORS.*

DECEMBER 8,2009

ORISSA SUPERIOR JUDICIAL SERVICE & ORISSA JUDICIAL SERVICE RULES,2007 – RULE 24

Interview – Candidates secure 45% of marks in aggregate and minimum 33% of marks in each paper are eligible to appear – Petitioner secured 44.93% marks in aggregate and more than 33% of marks in each subject but not called for the interview – Hence the writ petition.

Held, where the marks obtained by the candidate is with a fraction of 0.5 or above , it is to be rounded off to the next whole number so far as aggregate marks are concerned as per Rule 24 –Petitioner is eligible to appear in the interview. (Para 8)

Case laws Referred to :-

1.(1997)4 SCC 560 : (State of Orissa & anr.-V-Damodar Nayak & anr.).
2.(2008)1 SCC 233 : (Bhudev Sharma -V- District Judge,Bulandshahr & anr.)
3.(2005) 2 SCC 10 : (State of U.P. & anr.-V-Pawan Kumar Tiwari & anr.).

For Petitioner – Mr.S.P.Mishra,Sr.Advocate
S.K.Mohanty,. M.Jesthy & A.Samal.
For Opp.Party 1 – Govt. Advocate.
For Opp.Parties No.2 & 3 – Mr.B.K.Dash.

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*W.P.(C) NO.16782 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

SANJU PANDA, J. Challenge has been made by the petitioner in this writ petition to the action of the opposite parties in not calling her for interview (viva-voce test) in the Orissa Judicial Service Examination, 2009.

2. The facts, as narrated in the aplication, are as follows:

The Orissa Public Service Commission (in short, "the OPSC") published an advertisement inviting applications from suitable candidates for the Orissa Judicial Service Examination, 2009 for direct recruitment to fill up 77 posts of Civil Judges (J.D). Pursuant thereto, the petitioner having the requisite qualifications applied for the said post. She appeared in the Preliminary Written Examination which was held on 15th May, 2009. Being successful in the Preliminary Written Examination, she submitted long application from and appeared in the Main Written Examination which was held from 15th to 18th July, 2009. The list of successful candidates was published on 25th August, 2009. The Petitioner's name was not in the list. Immediately after publication of the result of the Main Written Examination, the petitioner with requisite fees applied for her marks obtained in the Main Written Examination. The general practice of the OPSC is that the mark sheets are issued after the publication of the final selection list for the post. Since the

interview in question was conducted in the month of October, 2009 and the result thereof was published on 16th October, 2009, the mark sheet of the petitioner was issued on 27.10.2009 which she received on 3.11.2009. After receiving the same, she came to know that she secured 44.93% of marks in aggregate and more than 33% of marks on each subject. In total, she secured 337 out of 750. As per Rule 24 of the Orissa Superior Judicial Service and Orissa Judicial Service Rules, 2007 (in short, "the Rules"), the Candidates who have secured not less than forty-five per centum of the marks in aggregate and a minimum of thirty-three per centum of marks in each paper in the written examination should be called for viva-vice test. Since the petitioner secured 44.93% marks in aggregate, she has approached this Court by filing this writ petition for a declaration that she should have been called for the interview as the fraction of marks, i.e.,44.93%, secured by her should have been rounded off to 45% and she has fulfilled the criteria as per the Rules.

3. Mr.S.P.Mishra, learned Senior Advocate appearing on behalf of the petitioner, submitted that the marks secured by the petitioner should have been considered in arithmetical principle of rounding off which postulates to treat any number with a fraction equal to or more than "0.5 mark" to the next whole number. That means, the fraction is to be counted as "1" . Since the petitioner secured 44.93% of marks, on the basis of the above arithmetical principle, should have been counted as 45%. Therefore, the petitioner should have been called for the interview as she fulfilled the criteria to be called for the interview as per the Rules. In support of his contention, he cited the decision report in (1997) 4 SCC 560, State of Orissa and another v. Damodar Nayak and another, wherein the apex Court, while considering the entitlement to grant-in-aid on acquisition of prescribed qualification, has held that since respondent no.1 secured 53.9% of marks, which was almost equivalent to 54% of marks, he was entitled to receive the grant-in-aid for payment of salary from the date of his acquiring qualification.

4. On being enquired by the Court, Mr.B.K.Dash, learned counsel appearing for opposite party no.2-OPSC, submitted that since the petitioner secured less than 45% of marks, she has not been called for the interview. The Rules stipulate that a candidate who has secured not less than 45% of marks in aggregate shall be called for the interview. Therefore, rightly the petitioner was not called for the said interview. Further on the query of the Court, he produced the letter dated 27.11.2009 of the OPSC and submitted that there are 3 candidates including the petitioner who had secured marks more than 44.5% in the O.J.S. (Main) Examination, 2009.

5. On the above submissions made by the learned counsel for the parties, this Court has to consider whether the petitioner fulfilled the criteria

as per the Rules to face the interview. In order to resolve the controversy, it is necessary to refer to the relevant Rule which is quoted below:

> **"24. Determination of number of candidates for interview** – The Commission shall call the candidates for interview who have secured not less than forty-five per centum of marks in aggregate and a minimum of thirty three per centum of marks in each paper in the written examination.

6. From a reading of the above Rule, it is clear that a candidate must secure minimum 33% of marks in each paper and also not less than 45% of marks in aggregate in the written examination. Admittedly, the petitioner secured 33% of marks in each paper of the written examination and 337 of marks in aggregate out of 750 which comes to 44.93% of marks.

7. In the cases of **Bhudev Sharma v. District Judge, Bulandshahr and another** reported in **(2008) 1 SCC 233** and **State of Orissa and another v. Damodar Nayak and another** reported in **(1997)4 SCC 560, State of U.P. and another v. Pawan Kumar Tiwari and another** reported in **(2005) 2 SCC 10,** the apex Court has held that if the fraction is 0.5 or above, it has to be rounded off so as to read as "1".

8. In the present case, the Rule is silent as to how the fraction of ½ marks or above secured by the candidates is to be considered while determining the percentage of marks. Therefore, taking into consideration the above principle decided by the apex Court in the absence of any Rule, we are of the view that where the marks obtained by the candidate is with a faction of 0.5 or above, it is to be rounded off to the next whole number so far as aggregate marks are concerned as per Rule 24. That is the general principle adopted in all educational institutions while awarding marks in the examination. However, we make it clear that where inter se merit of the candidates is to be examined in respect of percentage of marks in each paper in the written examination is concerned, the rounding off theory is not to be made applicable because the candidate may get the grace twice and may be a large number of candidates/applicants who might have secured equal marks with a fraction between 0.5 and 1. In the instant case, in aggregate only 3 (three) candidates have secured marks between 44.5% and 45%. Therefore, they are qualified/eligible to appear in the interview as per Rule 24.

9. In view of the above, it is open to opposite party no.2-OPSC to take steps in this regard as per the Rules.

The writ petition is accordingly allowed.

2010 (I) ILR-CUT- I48

I.M.QUDDUSI,ACJ & B.K.NAYAK,J.

T.DEV. KUMAR PATRA - V- STATE OF ORISSA & ORS.*

DECEMBER 4,2009

CONSTITUTION OF INDIA, 1950 – ART.266

Writ jurisdiction – Petitioner is claiming to enforce his rights flowing from a contract – No violation of any constitutional right or statutory obligation – Held, petitioner's claim cannot be enforced in this writ petition. (Para 8)

Case laws Referred to:-

1.AIR 1977 SC 1496 : (M/s.Radhakrishna Agarwal & Ors.-V-State of Bihar & Ors).
2.AIR 1972 SC 843 : (Banchhanidhi Rath -V-State of Orissa).
3.AIR 1981 SC 1368: (Divisional Forest Officer -V-Bishwanath Tea Co.Ltd.).

For Petitioner – M/s.H.S.Mishra. M/s.S.S.Rao & B.K.Mohanty.
For Opp.Party No.1 – Addl.Govt.Advocate.
For Opp.Party Nos.2 & 3 – M/s.C.A.Rao, S.K.Behera & A.K.Rath.

*W.P.(C) NO.13079 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

B.K.NAYAK, J. In this writ application, the petitioner prays for quashing of the letter dated 26.8.2009 under Annexure-5 and the tender notice dated 31.8.2009 under Anexure-6 and for commanding the opposite parties to renew the licence/lease as per Annexure-1 for a further period of three years.

2. The petitioner's case is that pursuant to a tender call notice to run a multi cuisine food court in the existing building near the Gate Complex of Nandankanan Zoological Park, he offered his bid and having qualified as the highest bidder was awarded the contract by the opposite parties. While applying, the petitioner had proposed to spend Rs.8,00,000/- to Rs.15,00,000/- for construction of projection on both sides of the existing structure as there was stipulation in the tender notice that the intending lessee shall invest for such projection. The petitioner qualified as the highest bidder and agreement was executed between the parties vide Annexure-1. The case of the petitioner is that as per the agreement the licence fee was Rs.1,21,100/- per annum which was payable monthly @ Rs.10,100/-. It is further the case of the petitioner that the license under the agreement though initially was for two years, it contains a term giving the petitioner a right of renewal for a further period of three years. It is also stated that in case of violation of the terms of the agreement, notice of 90 days shall be issued for termination of the contract. It is alleged by the petitioner that without issuing a notice of 90 days, as stipulated in the contract, and even though the petitioner went on paying the monthly licence fees regularly as per

Annexure-2 series, opposite party no.3 has issued the notice on 26.8.2009 under Anenxure-5 asking the petitioner to close the operation of the Food Court on completion of the tenure of the agreement on 7.9.2009 in order to facilitate the authorities to make alternative arrangement. Subsequent thereto, opposite party no.3 has issued tender notice on 31.8.2009 vide Annexure-6 inviting tenders from interested persons for running the food court.

3. It is the contention of the petitioner that he is duly abiding by all the terms and conditions of the agreement under Annexure-1 and there has been no default or violation on his part, but still then without renewing the contract for further three years, as stipulated under Clause-1 of the agreement, and without issuing any notice as required under Clause-11 of the agreement, the authority has issued letter as well as tender notice under Annexures-5 & 6 respectively which is arbitrary and wholly unreasonable.

4. The Deputy Director, Nandankana Zoological Park (opposite party no.3) has filed a counter affidavit. Referring to the agreement under Annexure-1, it is stated in the affidavit that the petitioner has committed default in paying the monthly licence fees at the stipulated time, i.e., in advance within the first week of every month. Referring to Clause-14 of the agreement, it is also stated that the petitioner has violated the condition stipulated in that clause by not revealing 1% of sale proceeds during the previous calendar year. The petitioner has sublet the food court to a third party without prior permission of opposite party no.3 and his performance was found to be poor. The petitioner has also committed irregularity in payment of electricity charges of the food court. The irregularities and defaults were pointed out to him by sending letters, which were not responded. It is, therefore, contended that in view of the violations of different terms and conditions, the petitioner was not entitled for renewal of the license for a further period of three years.

5. In order to appreciate the lis, it would be appropriate to quote the following clauses of the agreement under Anxxeure-1 which are relevant for the purpose:

> "(1) The licence shall be for two years from the date officially commencement of operation of food court and execution of this agreement and to be renewed for three years further period/s depending upon the performance and payment of licence fee without any default.
>
> (2) Payment of the licence fees of Rs.1,21,200/- per annum quoted by the licensee and approved by the competent authority shall be made on monthly basis of Rs.10,100/- per month shall be paid in advance in cash/demand draft to the Range Officer, Revenue in the 1st week of every month.

(11) The licensor reserves the right to terminate the license subject to issuing prior notice on particular violation of the rules mentioned herein this agreement at any point of time for breach of any of the terms and conditions of this agreement, after giving notice of 90 days in writing to comply the issues in writing to the satisfaction of the licensor, if there is no correction to the complain, the licensor can issue the termination notice giving further 90 days to terminate the contract.

(14) The licensee shall also pay 1% of the total sale proceeds after the close of one Calendar Year over & above the Bid Value. All the taxes, levis in connection with the transactions made by the licensee to run the food court would be his liability."

6. In effect, the petitioner raises a claim with regard to his right of renewal of license which flows from the contract of license. His assertion is that the opposite parties, who are state instrumentalities are depriving him of the right to renewal of license as per the terms of the contract. Essentially, therefore, the petitioner's prayer is for specific performance of the contract of license on the assertion of breach of terms and conditions by the opposite parties. There is no allegation of violation of any fundamental right or any statutory obligation. Law is well settled that writ petitions under Article 226 of the Constitution are not tenable only to enforce rights and obligations flowing from a contract, unless there is violation of any constitutional or statutory provision. Of course, at the very threshold or at the time of entry into the field of consideration of persons with whom the State Government can enter into a contract, the State is obliged to act in a manner so as to avoid discrimination, but after the State or its agents have entered into the field of ordinary contract, it is the contract itself which determines the rights and obligations of the parties inter se. Propounding such propositions, the apex Court in the case of ***M/s. Radhakrishna Agarwal and others v. State of Bihar and others***; AIR 1977 SC 1496 held as follows :

"It is thus clear that the Erusian Equipment & Chemicals Ltd's case (AIR 1975 SC 266) (supra) involved discrimination at the very threshold or at the time of entry into the field of consideration of persons with whom the Government could contract at all. At this stage, no doubt the State Act purely in its executive capacity and is bound by the obligations which dealings of the State with the individual citizens import into every transaction entered into in exercise of its constitutional powers. But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art.14 or of any other constitutional provision when the

State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of the contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

The Hon'ble apex Court in the aforesaid case also quoted the following declaration made in the case *of* ***Bachhanidhi Rath v. State of Orissa***, AIR 1972 SC 843.

"If a right is claimed in terms of a contract such a right cannot be enforced in a writ petition."

7. In the case of the ***Divisional Forest Officer v. Bishwanath Tea Co. Ltd*****;** AIR 1981 SC 1368 where the company tried to enforce through a writ petition the right to remove timber under a lease deed without the liability to pay royalty, which was a pure and simple contractual right, the Hon'ble apex Court held as under :

> "Ordinarily, where a breach of contract is complained of, a party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed, or the party may sue for damages. Such a suit would ordinarily be cognizable by the Civil Court. The High Court in its extraordinary jurisdiction would entertain a petition either for specific performance of contract or for recovering damages. A right to relief flowing from a contract has to be claimed in a Civil Court where a suit for specific performance of contract or for damages could be filed. This is so well settled that no authority is needed."

8. As has been seen earlier the petitioner is claiming to enforce his rights flowing from a contract of license without there being violation of any constitutional right or statutory obligation. Therefore, the petitioner's claim cannot be enforced in this writ petition.

9. The writ petition is therefore dismissed. However, there shall be no order as to costs.

Writ petition dismissed.

2010 (I) ILR-CUT- I52

B.P.DAS, J & INDRAJIT MAHANTY,J.

M/S GUPTA CABLES PVT.LTD. -V- ASST.COMMISSIONER OF SALES TAX, BHUHANESWAR & ANR.*

SEPTEMBER 2,2009

ORISSA VAT ACT,2004 (ACT NO.4 OF 2005) – SEC.57 (3) & 58

"Excess input tax credit" already determined in course of the original assessment.

Once an assessee who has "Un adjusted excess input tax credit" and such credit is not adjusted within the stipulated time, he has the option for either adjustment against output tax payable in subsequent periods or for refund of the same – Since there was never any short fall of tax paid/payable during the year 2006-2007, no question of excess input tax of 2005-2006 could or does arise.

Held, order dt.9.3.2009 rejecting the petitioner's refund application is quashed – Opposite parties are directed to effect the refund amount claimed by the petitioner within two months with interest.

(Para 15,16,18)

Case laws Relied on:-

1.AIR 1987 SC 537 : (The Comptroller & Auditor General of India,Gain Prakash New Delhi & Anr.-V-K.S.Jagannathan & Anr.)

2.JT.2009(6)SC1 : (Destruction of Public & Private Properties -V-State of A.P.& Ors.).

For Petitioner – M/s.S.Mohanty, R.K.Swain & P.K.Muduli.

For Opp.Parties – Mr.S.K.Patnaik, Stading Counsel, Revenue.

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*W.P.(C) NO.19508 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

I. MAHANTY, J. M/s Gupta Cables Private Limited(now known as Gupta Power Infrastructure Limited) a company registered under the Companies Act, 1956 is the petitioner in the present writ petition in which it has made prayer seeking quashing of the order dated 9.3.2009 (Annexure-8) passed by the Assistant Commissioner of Commercial Taxes, Bhubaneswar Range, Bhubaneswar under Section 57(3) of the Orissa Value Added Tax Act, 2004(hereinafter referred to as "OVAT Act,2004"), rejecting the refund application of the petitioner dated 29.4.2009 and further seeking a direction to the Assistant Commissioner of Sales Tax Puri Range, Bhubaneswar to refund Rs. 6,56,77,059.97paise as unadjusted input tax credit under Section 58(4) of the OVAT Act, 2004 read with Rule 66 of the Orisisa Value Added Tax Rules, 2005(hereinafter referred to as "OVAT Rules,2005").

2. Sri Sanjit Mohanty, learned Senior Counsel appearing for the petitioner submitted that the petitioner was assessed for the assessment period 1.4.2005 to 31.3.2006 vide assessment order dated 10.7.2007(Annexure-1), in terms of which the Assessing Officer came to determine tax and penalty

of Rs.1,21,96,698.12 and after adjusting the said demand against the input tax credit (in short "ITC") of Rs.7,81,73,758.09 came to hold that the balance amount of input tax credit of Rs.6,56,77,059.97 was directed to be carried forward to the next period. The petitioner further submitted that in terms of Section 58(4) of the OVAT Act, it was assessed to excess input tax credit for the assessment year 2005-2006 and since such input tax credit remained un-adjusted even after a period of twenty four months from the close of the year to which the tax period, for which the return showing the excess input tax credit relates, the petitioner may opt to claim for refund of the amount of such excess credit which remain unadjusted. It is further submitted that in terms of Rule 66 of the OVAT Rules, 2005 the petitioner made an application in form VAT-324 to the Assessing Authority within one month from the date of expiry of the period of twenty four months from the close of the year to which the tax period relates. It is therefore submitted that since the claim for refund related to the period 1.4.2005 to 31.3.2006, since the excess input tax credit determined for the said year was not adjusted during the subsequent twenty four months therefore, the petitioner made an application on 29.4.2008(Annexure-2) in form VAT-324 opting for claiming refund of unadjusted input tax credit for the period 2005-2006.

3. Mr. Mohanty further submitted that although in the assessment order under Annexure-1 a sum of Rs.6,56,059.97 had been determined to be excess input tax credit for the said year, yet, since the Assessing Officer had refused to give credit to the petitioner input tax credit for an amounting of Rs.17,69,021.21 towards the tax paid by the petitioner on purchase of furnace oil, grease, adhesive, bitumen paper, cotton waste and spare parts, challenging the same, the petitioner had preferred an appeal before the Addl.Commissioner Sales Tax (Revenue). This was registered as Appeal Case No. AA -12/ACST/Puri/2007-2008 and remained pending as on date of making necessary refund application under Annexure-2. While the refund application of the petitioner was not duly processed, in spite of reminders dated 5.9.2008 and 11.12.2008, the first appeal of the petitioner as referred herein above came to be allowed by the Addl.Commissioner Sales Tax (Revenue). vide his order dated 31.12.2008(Annexure-5) wherein, the appellate authority declared that the appellant was entitled to its claim for input tax credit of the tax paid by them on the purchase of furnace oil, as has been decided by the Hon,ble High Court of Orissa in W.P.(C) No. 11333 of 2006 in the case of Reliance Industries Limited decided on 15.5.2008. It was further held in the said appeal that in case of other goods like Grease, Adhesive, Bitumen Paper, Polythene, Cotton Waste and Spare parts are concerned, the Assessing Officer has simply disallowed the input tax credit without ascribing any reason, the Assessing Officer was directed to go through the actual process of manufacture and decide the claim of input tax

credit in accordance with the judgment of the Hon'ble High Court in the case of Reliance Industries Ltd (Supra). Accordingly, the order of assessment was set-aside and direction was issued to make re-assessment in terms of the observations indicated in the first appellate order.

4. It is only after the disposal of the petitioner's first appeal, vide order dated 31.12.2008, that a show cause notice under Sec. 57(3) of the OVAT Act, 2004 was issued to the petitioner calling upon the petitioner to show case under Annexure-6 (noting therein that since the assessment order for the period 2005-2006 (which is the basis of refund application) had been set aside in the first appeal with a direction to the Assessing Officer to re-do the assessment) the application for refund could not be entertained at such stage. Therefore, the petitioner was called upon to show cause as to why its application for refund shall not be rejected under Section 57(3) of the OVAT Act, 2004. The petitioner responded to the aforesaid show cause notice under letter dated 2.2.2009(Annexure-7). The Assistant Commissioner considered the explanation submitted by the petitioner under Annexure-7, and came to a conclusion that, since the original assessment for the year 2005-2006 had been set aside in appeal and no re-assessment had been made, till then no claim for refund could be entertained and accordingly, rejected the petitioner's application for refund.

5. In the light of the aforesaid factual matrix, learned counsel for the petitioner vehemently argued that the order of rejection of refund application is wholly illegal, arbitrary, without jurisdiction, contrary to the law and completely mala fide. The petitioner submits that its application for refund was made under Section 58(4) of the OVAT Act, 2004 and Rule 66 of the OVAT Rules, 2005. He further submits that Section 58 of the OVAT Act, 2004 has been specifically enacted by the legislature for the purpose of refund of tax "under special circumstances". In terms of Sub-section 4 of Section 58 of the OVAT Act,2004 since the petitioner had been found to have excess input tax credit during the assessment year 2005-2006 and further since such excess input tax credit was determined, through an assessment order and also remained unadjusted even after a period of twenty four months from the close of the year to which the tax period for which the return showing the excess input tax credit relates, this unadjusted input tax credit, which the petitioner submitted its option to claim for refund and made necessary application in form VAT-324.

5.1 It is submitted that such an application for refund tax under "special circumstances" cannot be denied by resorting to Sub-section 3 of Section 57 of the OVAT Act, 2004. It is submitted that Section 57 which also deals with a claim for refund of tax, interest or penalty paid by such dealer has no application to the application for refund sought for by the petitioner. The present case is not a case covered under Sub-section 1 of Section 57 of the

OVAT Act. It is further asserted that Sub-section 2 of Section 57 stipulates that where a claim for refund is made on the basis of return furnished by an assessee the Revenue have a right to provisionally adjust such refund claim against any tax due or tax payable by the assessee for any subsequent period. The first proviso thereof stipulates that excess input tax credit shall not be carried forward beyond a period of twenty four months from the close of the year to which the tax period is relates for adjustment against the tax due for the subsequent period or periods, except when dealer exercises "option" in writing for further carry-over. In the present case the petitioner asserts that in terms of Rule 66 of the OVAT Rules, 2005 the petitioner had exercised its option not to carry forward the excess input tax credit to any subsequent tax period and had instead sought for refund of the same. Therefore it is asserted that Sub-section 2 of Section 57 of the OVAT Act has no application to the facts of the present case.

5.2 In the light of the aforesaid contention, the petitioner asserts that an order under Sub-section 3 of Section 57 and exercise of such power in rejecting the petitioner's application for refund under Anexure-8 was not available, since clearly, the order allowing the petitioner's appeal related to the petitioner's claim for additional input tax credit amounting to Rs.17,69,021.21 towards tax paid by the petitioner on purchase of furnace oil, grease, adhesive, bitumen paper, cotton waste and spare parts. Learned counsel for the petitioner further submitted that the appeal was limited to the aforesaid aspect and therefore, the order allowing the appeal and directing for reassessment, cannot in law be termed to be an "open remand" and instead, on reassessment the Assessing Authority in course of re-assessment could only determine, as to what extent the petitioner's claim for additional input tax credit could be allowed or not. In other words it is submitted that setting aside of the order of assessment and directing remand and re-assessment cannot be turned as an "open remand" and must be treated as "limited remand", limited only to the issue raised by the petitioner in the said appeal and the consequent determination made by the appellate authority on the specific contention raised in the said appeal.

5.3 In other words, it is submitted that, the fact that the assessee had been determined to have a balance amount of input tax credit of Rs.6,56,77,059.97 is no longer open for re-consideration. The additional claim of the petitioner for additional input tax credit for Rs.17,69,021.21 could be the only issue that the Assessing Officer could enter into and determine in course of the re-assessment. Therefore, petitioner submitted that quantification of excess input tax credit of Rs. 6,56,77,059.97 had obtained a finality and since the application for refund made by the petitioner under Annexure-2, pertains to the said amount and in no manner covering the additional input tax credit that may be determined to be available to the

petitioner on completion of the re-assessment proceeding, is of no relevance at present. In the light of the aforesaid submission, learned counsel for the petitioner submitted that the order impugned under Annexure-8, rejecting the petitioner's application for refund may be quashed and direction may be issued to the authorities to effect refund of the amount applied for by the petitioner.

6. Mr. S.K.Patnaik, learned counsel appearing for the Revenue on the other hand, submitted that there is no legal error what-so-ever in the order passed by the Assistant Commissioner of Sales Tax, Puri Range, Bhubaneswar, in rejecting the application for refund made by the petitioner, since the order of assessment on the basis of which refund application has been made, has been set aside in first appeal preferred by the petitioner and the matter stands remitted back to the Assessing Officer for reassessment. Learned counsel, placed reliance on Section 57(3) of the OVAT Act and submitted that no claim for refund is entertainable unless the re-assessment as directed by the first appellate authority is concluded. A further plea was sought to be advanced by the Revenue in the counter affidavit is to the effect that, the petitioner is not entitled to refund of excess input tax credit for the year 2005-2006 since the excess input tax credit for the said year has been adjusted during the subsequent year, i.e., 2006-2007 towards output tax under OVAT and CST Act. Sri Patnaik further submitted that Section 58 of the OVAT Act provides that if the input tax credit at the end of any year remains unadjusted against the output tax of two subsequent years, then only the assessee has option to claim for refunding of the unadjusted amount. It is asserted that since input tax credit for the year 2005-2006 was adjusted during the year 2006-2007, no refund under Section 58 of the OVAT Act could be claimed. It is further submitted that on a conjoint reading of Sections 57 and 58 of the OVAT Act it would be clear that when there is a direction for re-assessment, no refund can be granted even under Section 58 of the OVAT Act. In this respect learned counsel for the Revenue presented before this Court a statement of the returns filed by the petitioner for 2006-2007 in a tabular form. Such statement has been signed by the Joint Commissioner of Commercial Taxes, Bhubaneswar Range, Bhubaneswar.

In the matter of M/s.Gupta Cables Pvt. Ltd. Vrs. ACST, Puri Range, Bhubaneswar in W.P.(C) No.19508 of 2008 before the Hon'ble High Court of Orissa.
Details of original return for the year 2006-07.

Tax period	Date of filing of return	I.T.C.(B/F)	Out put VAT	CST Adjusted	Balance ITC 3-(4+5)=6	I.T.C.	Reversed ITC	Balance ITC (6+7)8=9
1	2	3	4	5	6	7	8	9
April,06	20.5.06	74306022.11	77959.61	2867455.18	71360607.32	8355406.51	151964.54	79564099.29
May,06	21.6.06	79564049.29	263091.97	2342236.99	76958720.27	12812965.16	177052.84	89594632.65
June,06	21.7.06	89594632.65	439959.61	3228647.72	85926025.26	9581582.02	75429.66	95432177.66
July,06	21.8.06	95432177.68	2061.74	7965036.83	87465079.05	12173673.12	98504.86	99540247.37
Aug.,06	21.9.06	99540247.37	320163.14	6123307.29	93096776.88	11534823.34	691044.92	103940555.36
Sept.06	23.10.06	103940555.36	4330362.13	6257781.04	93352412.13	18370630.29	511553.42	111211489.06
Oct.,06	21.11.06	111211489.06	3563013.07	7030345.52	100618130.41	16830450.48	331237.21	117117343.06
Nov.,06	21.12.06	117117343.74	4186466.12	8019442.82	104911434.74	12796378.67	22625.48	117685187.99
Dec.,06	21.1.07	117685187.99	6787618.38	3924830.08	106972739.47	12442481.36	250149.00	119165071.87
Jan.,07	21.2.07	119165071.89	6483269.97	4568368.62	108113433.24	15335277.45	198908.14	123249802.61
Feb.,07	21..3.07	123249802.64	6486057.68	5195343.55	111568401.32	12505022.61	724513.01	123348910.98
Mar.,07	23.4.07	123348910.98	6299651.43	10170884.00	106878375.55	17149869.44	203786.92	123824458.07
Total			39239674.85	67693679.64		159888560.45	3436770.00	

Sd/-
JOINT COMMISSIONER OF COMMERCIAL TAXES,
BHUBANESWAR RANGE, BHUBANESWAR

7. Sri Patnaik placing reliance on the aforesaid statement stated that in terms of the monthly returns filed by the assessee itself, in the month of April, 2006, the assessee had shown the input tax credit brought forward from the earlier assessment year, i.e., 2005-2006. He therefore submitted that once the petitioner has brought forward the input tax credit from the earlier year and sought adjustment of the same in course of the subsequent year i.e., 2006-2007, such excess input tax credit having been adjusted, no claim for refund of the same under Section 58 of the OVAT Act, would be entertainable.

7.1 Sri Patnaik further submitted that the writ petition deserves to be dismissed for the reasons noted in the order under Annexure-8 as well as on the legal grounds raised in the counter affidavit filed by the Revenue.

8. Sri Mohanty, learned Senior Counsel for the petitioner stated in response to the assertion made by the Revenue that the petitioner had already sought adjustment of the excess input tax credit for the assessment year 2005-2006 during the subsequent assessment year 2006-2007, is wholly erroneous and baseless. Learned counsel placed reliance on Annexure-B to the counter affidavit of the petitioner which was the assessment order for the assessment year 2006-2007. In particular he drew the attention of the Court to the conclusion, reached by the Assessing Officer, that the tax for 2006-2007 was determined to Rs.4,10,69,342.00 where as the input tax credit availed to the petitioner during the said year, i.e., 2006-2007 was Rs.15,91,03,885.51. From the aforesaid availed input tax credit during the said year of assessment, i.e., 2006-2007, an amount of Rs.4,10,69,342.00 was deducted as “output tax” and a further amount of Rs.5,82,09,363.25 was deducted as “CST” and a further amount of Rs.34,90,753.28 was deducted towards “reverse credit” and once again excess input tax credit for the assessment year 2006-2007 was determined to be Rs.5,63,34,436.98.

8.1 Sri Mohanty submitted that since during 2006-2007 the petitioner also had excess input tax credit available during very same year, no question of seeking adjustment of excess input tax credit was available to the petitioner for the earlier year i.e., 2005-2006 could nor does arise. Further learned counsel submitted that for the assessment year 2006-2007 the excess input tax credit determined as noted herein above, was also not adjusted in the subsequent two accounting years, i.e., 2007-2008 and 2008-2009 and consequently thereto the petitioner had sought for refund of the said excess input tax credit under Section 58(4) and Rule 66 of the OVAT Act & Rules respectively. Most importantly the said application for refund for the year 2006-2007 was allowed vide order dated 2.6.2009 passed by the Joint Commissioner of Sales Tax, Bhubaneswar Range, Bhubaneswar under Annexure-10 to the rejoinder affidavit. In terms of the said order while the

petitioner had been found to have excess input tax credit at the end of March, 2007 of an amount of Rs.5,63,34,436.98 after adjusting a demand of Rs.16,79,945.00 as due for the assessment year 2006-2007 (by virtue of rectification order No.1730 dated 2.6.2009) refund was granted for an amount of Rs.5,46,54,492.00 in form VAT-319 and Rs.16,17,945.00 was refunded by way of refund adjustment voucher in form VAT-318 to square up the demand payable by the dealer. Learned counsel for the petitioner therefore submitted that the excess input tax credit for the year 2005-2006, refund of which was rejected vide impugned order under Annexure-8, yet the self-same officer has allowed the refund of excess unadjusted input tax credit for the subsequent year 2006-2007 and hence, there can be no justifiable ground for denying refund to the petitioner for an earlier period, i.e., 2005-2006 for which there is no demand pending against the petitioner. Apart from the above, the petitioner's counsel drew our attention to the impugned order Annexure-8 and in particular to the following observation:-

> "……..The refund application was sent to the CCT Orissa for withholding of refund vide this Office letter No.421/CT dated 6/9/08 on the ground that the dealer has preferred 1st appeal before the Additional Commissioner of Sale Tax (Revenue) u/s. 60(1) of the OVAT Act. The CCT, Orissa, vide letter No.19190/CT, dated 10/12/08 returned the proposal with an observation to dispose of the application after necessary enquiry".

9. Relying on the above, learned counsel for the petitioner submitted that since the Commissioner had returned the proposal made by the Assistant Commissioner for withholding the refund and had further directed the authorities to dispose of the application after necessary enquiry. Since the Commissioner had refused to exercise the power under the OVAT Act, it was no longer possible nor permissible for the Assistant Commissioner to effectively seek to withhold the refund by resorting to the purported power or the authority vested under Section 57(3) of the OVAT Act and which has no application to the fact of the present case/situation.

10. Sri Mohanty submitted that the submission made by the learned counsel appearing for the Revenue by relying on the tabular statement submitted in the Court (extracted herein above) is wholly erroneous. He further submitted that the prayer of the petitioner to quash Annexure-8 and to direct the authorities concerned to effect the refund, is within the competence of the High Court and in this respect he placed reliance on the judgment of the Hon'ble Supreme Court in the case of **The Comptroller and Auditor General of India, Gian Prakash, New Delhi and another v. K.S.Jagannathan and another,** reported in AIR 1987 SC 537 and in particular para-20 thereof which is extracted herein below:-

"There is thus no doubt that the High Courts in India exercising their jurisdiction under Article-226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has filed to exercise or has wrongly exercise the discretion conferred upon it by a statute or a rule or a policy decision or the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the Court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

11. Learned counsel for the petitioner also placed reliance on a recent judgment of the Hon'ble Supreme Court in the case of **Destruction of Public and Private Properties v. State of A.P. and Ors,** reported in JT 2009(6) SC 1, where in the Apex Court reiterated the principle applied in the case of the Comptroller and Auditor General of India, Gian Prakash, New Delhi and another (supra) and further enunciated the said principle in para-28 of the said judgment which is extracted herein below:-

"The principle enunciated in the above case was approved and followed in **King v. Revising Barrister for the Borough of Hanley**. In **Hochtief Gammon** case this Court pointed out (at p. 675 of Reports: SCC p. 656) that the powers of the courts in relation to the orders of the government or an officer of the government who has been conferred any power under any statute, which apparently confer on them absolute discretionary powers, are not confined to cases where such power is exercised or refused to be exercised on irrelevant considerations or on erroneous ground or mala fide, and in such a case a party would be entitled to move the High Court for a writ of mandamus. In **Padfield v. Minister of Agriculture, Fisheries and Food**, the House of Lords held that where Parliament had conferred a discretion on the Minister of Agriculture, Fisheries and Food to appoint a committee of investigation so that it could be used

to promote the policy and objects of the Agricultural Marketing Act, 1958, which were to be determined by the construction of the Act which was a matter of law for the court and though there might be reasons which would justify the Minister in refusing to refer a complaint to a committee of investigation, the Minister's discretion was not unlimited and if it appeared that the effect of his refusal to appoint a committee of investigation was to frustrate the policy of the Act, the court was entitled to interfere by an order of mandamus. In Halsbury's Laws of England, 4th Edn., vol.I, Para 89, it is stated that the purpose of an order of mandamus:

"is to remedy defect of justice; and accordingly it will issue, to the end that justice maybe done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the government or a public authority has failed to exercise or has wrongly exercised, the discretion conferred upon it by a statute or a rule or a policy decision of the government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy of implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice preventing to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion."

11.1 Sri Mohanty learned counsel for the petitioner submitted that the ordered under Annexure-8 deserves to be quashed and a further direction be issued for effecting refund to the petitioner along with interest thereon.

12. In the light of the submission advanced by the learned counsel for both the parties it would be most relevant to take note of Sections 57 & 58(4)

of the OVAT Act, 2004 and Rule 64, 65(4) and 66 of the OVAT Rules, 2005 and the same are quoted below :-

"**Section 57**.**Refund**-(1) Subject to other provisions of this Act and the rules, the assessing authority shall refund to a dealer, within a period of sixty days of the date of receipt of such order giving rise to such refund, the amount of tax, including interest or penalty of both, if any, paid by such dealer in excess of the amount due from him, through refund adjustment or through refund voucher:

Provided that the assessing authority shall first adjust such excess amount towards the recovery of any amount due in respect of which a notice under Sub-section(4) of Section 50 has been issued , or any amount due for any period covered by a return but not paid and, thereafter, refund only the balance, if any.

(2) Where any refund is due to any dealer according to return furnished by him for any period, such refund may provisionally be adjusted by him against the tax due or tax payable, as per the returns filed under Section 33, for any subsequent period:

Provided that the excess input tax credit for any period shall not be carried forward beyond a period of twenty four months from the close of the year to which that tax period relates for adjustment against the tax due for subsequent period or periods, except when the dealer exercises option in writing for further carry over.

Provided further that the amount of tax, including interest of penalty or both if any, due from, and payable by, the dealer on the date of such adjustment shall first be deducted from the amount of such refund before adjustment.

(3) No claim for refund of any tax, including interest or penalty or both, if any, paid for any tax period or periods under this Act shall be allowed in any case where there is an order for reassessment for such period until such reassessment is completed.

Section 58. Refund tax under special circumstances:

xx xx xx xx

(4) (a) Where any excess input tax credit for a tax period is carried forward for adjustment against the tax due for subsequent tax period or periods and such credit or part thereof remains unadjusted even after a period of twenty four months from the close of the year to which the tax period for which the return showing the excess input tax credit relates, the dealer may opt to further carry forward the credit till final adjustment or may claim refund of the amount of such excess credit remaining adjusted.

(b) Where a dealer opts for refund under Clause (a), he shall make an application to that effect to the assessing authority within such time and in such manner as may be prescribed.

(c) Any refund covered under the sub-section shall be granted in such manner and subject to such conditions and restrictions as maybe prescribed.

"Rule **64. Refund**-(1) No application is required for sanction of refund arising out of any order of appeal, revision or rectification under the Act and such refund shall be allowed within sixty days of the date of receipt of such order.

(2) Refund sanctioned under Sub-rule (1) shall be paid, either through refund adjustment voucher or through refund payment voucher or both.

(3) The refund adjustment voucher shall be in Form VAT 318 and the refund payment voucher shall be in Form Vat 319.

(4) Refund arising out of a return furnished for any tax period subject to exceptions as specified under Rule 66, shall be carried forward for adjustment of tax due and payable in subsequent tax period or tax periods, until the expiry of a period of twenty four months, from the end of the year to which that tax period relates.

65. Refund under special circumstances:-

xx xx xx

(4) (a) The claim of refund arising out of Clause (a) of Sub-section(2) of Section 58 shall be made by application in Form VAT 323 signed and verified by an authorized officer.

(b) The grant of refund claimed under this sub-rule shall be subject to the following conditions:-

(i) the purchase should have been made from a registered dealer in the state on payment of tax supported by a retail invoice;

(ii) each retail invoice shall be in the minimum for a tax-exclusive price of Rs.1,000/-.

(iii) the claim shall be made quarterly;

(iv) the goods involved in the purchases are only for official use; and

(v) the application for refund shall be filed within a period of fourteen days from expiry of the quarter.

66. Refund of input tax credit carried forward beyond a period of twenty-four months- The claim of the refund under Clause (a) of Sub-section (4) of Section 58 shall be made in Form VAT 324 to the assessing authority of the circle or range, as the case may be, within one month from the date of expiry of the period of twenty four months from the end of the year to which the tax period relates.

Provided that where the application as referred to in this Rule is not made within the period of one month, it will be deemed that the dealer has exercised option to carry forward the excess input tax credit for adjustment against output tax payable in such subsequent tax periods:

Provided further that an application for refund made after the period of one month may be admitted by the assessing authority if he is satisfied that the dealer had sufficient cause for not making the application within the said period."

13. On an analysis of Sections 57 & 58 of the OVAT Act, we are of the considered view that both provides for refund. Whereas Section 57 is the general clause covering refund, Section 58 has been enacted for refund of tax under "special circumstances". A person who seeks to claim for refund of "un-adjusted excess input tax credit", is required to make an application signifying his option for the same and in terms of Rule 66 such option is to be exercised within a period of one month from the date of expiry of the period of twenty four months from the end of the year to which the tax period relates. In the present case there is no dispute that the refund application relates to the assessment year 2005-2006 and petitioner has made an application for refund under Annexure-2 in form VAT-324 on 29.4.2008, i.e., within the period stipulated under the Act and Rules. Clearly the intention of the legislature in this regard is that once an assessee who has "un-adjusted excess input tax credit" and such credit is not adjusted within twenty four months from the end of the year to which the tax period relates, is required to, within one month therefrom exercise his option for either adjustment against output tax payable in subsequent periods or for refund of the same. There is no other pre-condition prescribed in the statute apart from the above for entertaining an application for refund. Clearly in the present case this requirement of law has been met by the petitioner.

14. On a reading of the Sections 57 & 58 along with Rules 64,65 and 66 of the OVAT Act,2004 and OVAT Rules,2005 respectively it would be clear that legislature mandates differential treatment for application for refund under Sections 57 & 58. Whereas for refund under Section 57 no application is required for sanction of refund arising out of any order, appeal, revision or rectification under the Act and such refund shall be allowed within sixty days of the receipt of such order.

14.1 As far as Section 58 is concerned, an application in form VAT 324 is required to be made by an assessee and that to within the period of one month from the date of expiry of the period of twenty four months from the end of the year to which the tax period relates. Apart from the aforesaid distinction it is clear whereas under Sec.57 refund flowing there under does not contemplate the necessity for making an application for refund, since it is mandated therein, that refund shall be allowed within sixty days of receipt

of such order. Section 58 deals with "special circumstance" in which an assessee has unadjusted input tax credit still available even after twenty four months from the end of the year to which tax period relates and it is only in such case, that an assessee may within one month therefrom opt either to carry forward of input tax credit for adjustment against output tax payable in subsequent tax period or to seek refund thereof. Therefore Sections 57 & 58 being distinct, we are therefore unable to accept the contentions of the Revenue that Sections 57 and 58 must be read together. We are of the considered view that both the provisions have distinctly different circumstances for application and therefore cannot be read together.

15. On a detailed reading of the impugned order, under Annexure-8 by which order the Assistant Commissioner rejected the petitioner's refund application, it is clear that the only reason described in the said order relates to the condition imposed under Section 57(3) of the OVAT Act, i.e., since the petitioner had succeeded in his appeal, the matter had been remanded back for reassessment by the Assessing Officer which was not yet done.

15.1 In this respect we are in complete agreement with the contention advanced on behalf of the petitioner and do not find any merit on the contention raised by the Revenue. It is absolutely clear from the assessment order 2005-2006 that the petitioner had a balance amount of input tax credit of Rs.6,56,77,059.97 which was directed to be carried forward to the next period. Though an appeal was preferred by the petitioner against the assessment order under Annexure-1, the same was limited to the question of disallowance of the claim for additional input tax credit of Rs.17,69,021.21. The said claim was based on tax paid by the petitioner on account of purchase of goods like Furnace oil, Grease, Adhesive, Bitumen paper etc. The claim of the petitioner was dealt with by the appellate authority and by making various observations in the appellate order, the assessment order was set aside and direction was issued for reassessment. This direction for reassessment in our considered view has not resulted in any "open remand" but amounted to a "limited remand" and therefore the consequence of such limited remand would be limited to the extent to which the petitioner's claim for "additional input tax credit", over and above, the input tax already determined in course of the original assessment. In other words, we are of the considered view that in course of the reassessment, the Assessing Officer, in terms of the direction issued by the first appellate authority, would have to reassess the claim of the petitioner relating only to the claim for "additional input tax" of Rs.17,69,021.21 for having paid tax on purchase of Furnace oil, Grease etc. The reassessment proceeding not is being an "open remand". It would not have any impact on the amount of "excess input tax credit", already determined in course of the original assessment, i.e.,

Rs.6,56,77,059.97. In view of this, we are of the view that Section. 57(3) would have no application in such circumstances since the present claim of the petitioner is not dependent upon any re-determination that the Assessing Officer is required to do on remand.

16. We are further of the considered view that the additional plea raised by the Revenue, in its counter affidavit in support of its order under Annexure-8 is not at all germane nor entertainable under the settled law since it is well settled principle of law that the impugned order must speak for itself and no additional ground can be taken in the counter affidavit where the order impugned is under challenge. So on this score itself we are of the view that the contentions raised by the Revenue in the counter affidavit itself are wholly baseless.

16.1 Even though we are of the view that the additional reasons stated in the counter affidavit can't but rest on the reasons cited in Annexure-8, even then, we are of the view that the claim made by the learned counsel for the Revenue that the excess input tax credit for 2005-2006 had been adjusted during the assessment year 2006-2007 is also wholly baseless. The tabular statement filed by the Revenue in course of hearing, noted herein above, itself clearly shows that whereas input tax credit brought forward in April, 2006(relatable to assessment year 2005-2006) is Rs.7,43,06,022.11, the amount indicated in col.3 for the subsequent months is seen, in no month during the year 2006-2007, has the input tax credit carried forward been less than the brought forward balance amount shown in April, 2006. Therefore on this ground alone it would be clear from the tabular statement itself, that, in fact there has been no adjustment of the excess ITC of the year 2005-2006 during the year 2006-2007.

16.2 A further reason as to why we cannot accept the stand of the Revenue on the score is that for the year 2006-2007 whereas VAT dues calculated to be Rs.4,10,69,342.00 yet, in the assessment order (Annexure-B) to the counter affidavit, the Assessing Officer had determined that in course of said year, i.e., 2006-2007 the petitioner was entitled to input tax credit of Rs.15,91,03,885.51 and after deducting a sum of Rs.4,10,69,342.00 towards VAT and Rs.5,82,09,363.25 towards CST as well as after adjusting Rs.34,90,743.28.00 towards reverse credit it was determined that the petitioner still had a balance amount of ITC for 2007-2008 amounting to Rs.5,63,34,436.98. Therefore, since there was never any short fall of tax paid/payable during the year 2006-2007, no question of adjustment of excess input tax of 2005-2006 could or does arise in the fact of the present case.

17. Apart from the views expressed by us herein above in the present case, the facts emanate therefrom, clearly indicate that while the petitioner had applied for refund on 29.4.2008 yet, the said application was not

processed and instead recommendation was made to with-hold the said refund application vide letter dated 6.9.2008 by the Assistant Commissioner of Sales Tax, Puri, on the ground that the dealer had preferred first appeal before the Additional Commissioner Sales Tax under Section 60(1) of the OVAT Act. This request of the Assistant Commissioner was specifically turned down by the Commissioner Commercial Tax, vide his letter dated 10.12.2008 by returning the proposal with a further direction to dispose of the application for refund after necessary enquiry. Thereafter, vide a show cause notice dated 7.1.2009, called upon the petitioner to show cause as to why his application for refund should not be rejected. The aforesaid facts are tell tale. While the petitioner's refund application was not processed even after the Assistant Commissioner's request to the Commissioner of Commercial Taxes to withhold the refund was turned down by the Commissioner on 10.12.2008 with a further direction to him to dispose of the refund application after necessary enquiry, This fact clearly indicates mala fide in exercise of quasi judicial authority.

18. In the light of the findings arrived by us as noted herein above and keeping in view the principle of law evolved by the Hon'ble Supreme Court in the cases of, the Comptroller and Auditor General of India, Gian Prakash, New Delhi(supra) and another and Destruction of Public and Private Properties (supra), we allow the writ application and quash the order dated 9.3.2009(Annexure-8) rejecting the petitioner's refund application, and direct the opposite parties to effect the refund amount claimed by the petitioner under Annexure-2 within a period of two months from the date of communication of this order along with interest due to the petitioner in terms of Section 59 of the OVAT Act, 2004.

19. With the aforesaid direction and observation, the writ petition is allowed but in the circumstances without cost.

Writ petition allowed.

2010 (I) ILR-CUT- I68

B.P.DAS,J & S.C.PARIJA,J.

NORTH EASTERN ELECTRICITY SUPPLY COMPANY OF ORISSA LTD.
-V- STATE OF ORISSA & ORS.*
DECEMBER 9,2009

RIGHT TO INFORMATION ACT,2005 (ACT NO.22 OF 2005) – SEC.2 (h).

"Public Authority" – Whether North Eastern Electricity Supply Company of Orissa Ltd. falls within the definition of "Public Authority" as defined under the Right to Information Act – Yes.

(Para 13)

Case laws Referred to:-

1.AIR 2009 Bombay 75 : (Dr.Panjabrao Deshmukh Urban Co-operative Bank Ltd -V-The State Information Commissioner, Vidarbha Region,Nagpur & ors.)

2. AIR 2008 Punjab & Haryana 117 : (D.A.V.College Trust & Management Society & ors.-V-Director of Public Instruction & ors.)

3. AIR 2008 Allahabad 92 :(Dhara Singh Girls High School,Ghaziabad-V-State of Uttar Pradesh & ors.).

For the petitioner – M/s.B.K.Mohanty & D.K.Mohanty.

For the Opp.Parties – M/s.K.N.Jena,, B.P.Bal, A.K.Sahu, P.K.Jena, D.Sethi,D.K.Mohapatra,D.P.Mohapatra& S.Chakravarty (for interveners)
And Advocate General & Addl.Govt.Advocate (for Opp.Party Nos.1 to 3)

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*W.P.(C) NO.9042 OF 2006. In the matter of an application under Articles 226 & 227 of the Constitution of India.

S.C.PARIJA, J. This writ application is directed against the letter of the State Government in the Energy Department dated 17.12.2005 (Annexure-2), holding that the petitioner company falls within the definition of "public authority" as defined in Section 2 (h) of the Right to Information Act, 2005 (for short RTI Act).

2. The sole contention raised by the learned counsel for the petitioner is that the petitioner company, i.e. North Eastern Electricity Supply Company of Orissa Limited (NESCO) is a public limited company, incorporated under the Companies Act, 1956, having its registered office at Bhubaneswar and commenced its business as a 100% subsidiary of Grid Corporation of Orissa Limited (for short GRIDCO), which is a wholly owned Government Company, with the object of undertaking distribution and supply of electricity. The petitioner company is engaged in distribution and supply of electricity in the southern parts of Orissa under a statutory licence granted to it by the Orissa Electricity Regulatory Commission (OERC). The petitioner company was privatized on 01.04.1999 as per the transfer scheme envisaged under the Orissa Electricity Reforms (Transfer of Assets,

Liabilities, Properties & Personnel of GRIDCO to Distribution Companies) Rules, 1998, (for short 1998 Rules), and became a joint venture company between BSES Ltd. and GRIDCO, after 51% equity and management control was divested by the GRIDCO in favour of the petitioner company. Accordingly, the GRIDCO, which is a wholly owned Government Company, was dissolved and its assets, undertakings, employees and liabilities etc. were vested with the petitioner company. The business of the petitioner company is governed by the provisions of the Electricity Act, 2003 and Orissa Electricity Reforms Act, 2005 and rules/regulations framed thereunder and their performance and tariff are regulated by OERC.

3. It is accordingly submitted by the learned counsel for the petitioner that the petitioner company being a public limited company engaged in distribution and supply of electricity in the southern part of Orissa, under a licence granted to it by the OERC, it is not a "public authority", as defined in Section 2(h) (i) of the RTI Act and therefore, the decision of the State Government in the Energy Department, holding that the petitioner company falls within the said definition is erroneous and misconceived. In support of his contention, learned counsel has relied upon a Single Bench decision of Bombay High Court, in the case of **Dr.Panjabrao Deshmukh Urban Co-operative Bank Ltd. Vs. The State Information Commissioner, Vidarbha Region, Nagpur & Ors.**, AIR 2009 Bombay, 75.

4. In the said decision, Hon'ble Single Judge was considering the question whether the petitioner, which was Co-operative Bank, was a "public authority" within the meaning of Section 2(h) of the RTI Act. On the facts of the said case, the Hon'ble Court held that there was nothing to show that the petitioner-Bank was having any monopoly nor it had any State protection. The Co-operative Bank did not discharge any governmental function and the function of the Bank can be carried out by any private individual or by institution registered under the appropriate law. Accordingly, the Hon'ble Court proceeded to hold that as there was no direct or indirect control over the affairs of the Bank for deep and pervasive control, the petitioner-Bank was not a "public authority", within the meaning of Section 2(h) of the RTI Act.

5. Learned Advocate General with reference to the counter affidavit filed by the State submits that to provide for restructuring of the electricity industry for rationalization of the generation, transmission, distribution and supply of electricity, for avenues for participation of private sector entrepreneurs in the electricity industry in the State in an efficient, economic and competitive manner including the constitution of an Electricity Regulatory Commission for the State and for matters connected therewith or incidental thereto, the State Government enacted the Orissa Electricity

Reform Act, 1995 (Orissa Act 2 of 1996). As a measure of restructuring and reforming the power sector in Orissa the State Government framed the 1998 Rules for the purpose of providing and giving effect to the preparation and implementation of a scheme to transfer the distribution undertakings of GRIDCO to the distribution companies. Accordingly, the entire State was divided in four distribution zones/areas for supply of electricity and incorporated four distribution companies. The present petitioner company is engaged in distribution of supply of electricity within the southern parts of Orissa. It is submitted that the 4 distribution companies including the petitioner company are public limited companies but performing very essential public duty and also executing schemes sponsored by the Central and the State Government. These companies, including the present petitioner, came into existence as per the 1998 Rules and have been entrusted with the task of spending the Central and State Government assistance, while executing such scheme. Further, the petitioner company as well as the other 3 distribution companies are in charge of collection of electricity duty, which is a Government revenue, along with the energy charges, collected from the customers. The petitioner company is a subsidiary of GRIDCO, which is a wholly owned company of the State Government, which holds 49% of share in the petitioner company and therefore, the petitioner company is indirectly funded by the State Government through the shares held by the GRIDCO. It is further submitted that various schemes like Accelerated Power Development & Reform Programme (APDRP) and Minimum Need Programme (MNP) etc. are carried out by the petitioner company, for which funds are provided by the State Government for electrification work in the State. Accordingly, it is submitted that the petitioner company is a "public authority" as defined in Section 2(h) of the RTI Act.

6. Learned counsel for the State has relied upon a Division Bench decision of Punjab and Haryana High Court, in the case of **D.A.V.College Trust & Management Society & Ors. Vs. Director of Public Instruction & Ors.**, AIR 2008 Punjab and Haryana 117, wherein the Hon'ble Court was considering the question whether the D.A.V. College, Chandigarh, could be regarded as a "public authority" within the meaning of Section 2(h) of the RTI Act. On the facts of the said case, the Hon'ble Court came to hold as under:

> "A perusal of the definition of 'public authority' shows that 'public authority' would mean any authority or body or institution established or constituted apart from other things by the notification issued by an order made by the appropriate Government. It is to include even any body owned, controlled or substantially financed or non Government Organisation substantially financed directly or

indirectly by the funds provided by the appropriate Government. It is undisputed that the petitioners are receiving substantially grant-in-aid from the Chandigarh Administration. Once a body is substantially financed by the Government, the functions of such body partake the character of 'public authority'. The definition of expression 'public authority' itself shows that 'public authority' would include any organization/body owned, controlled or substantially financed directly or indirectly by funds provided by the Government or even the non-government organization which is substantially financed. The petitioner has claimed that they are getting only 45% grant-in-aid after admitting that initially the grant-in-aid paid to them was to the extent of 95%. In on account of policy of the Government the grant-in-aid to the extent of 95% which was given initially allowing the petitioner to build up its own infrastructure and reducing the grant-in-aid later would not result into an argument that no substantial grant-in-aid is received and therefore it could not be regarded as 'public authority'. Therefore, we do not find any substance in the stand taken by the petitioner that it is not a 'public authority'."

7. Learned counsel for the State also relies upon a Single Bench decision in the case of **Dhara Singh Girls High School, Ghaziabad Vs. State of Uttar Pradesh & Ors.**, AIR 2008 Allahabad 92, wherein the question for consideration was whether the petitioner, which is a Girls High School, recognized and receiving grant-in-aid from the State Government, is a 'public authority'' as defined under Section 2(h) of the RTI Act.

The Hon'ble Court held as follows:

"In my opinion, whenever there is even an iota of nexus regarding control and finance of public authority over the activity of a private body or institution or an organization etc. the same would fall under the provisions of Section 2(h) of the Act. The provisions of the Act have to be read in consonance and in harmony with its objects and reasons given in the Act which have to be given widest meaning in order to ensure that unscrupulous persons do not get benefits of concealment of their illegal activities or illegal acts by being exempted under the Act and are able to hide nothing from the public. The working of any-such organization or institution of any such private body owned or under control of public authority shall be amenable to the Right to Information Act. The petitioner being an institution recognized under the provisions of U.P.High School and Intermediate Education Act, 1929 and receiving grant-in-aid from the State Government is therefore, covered under the aforesaid Act."

8. The very object of the RTI Act is to provide for setting out the practical regime of right to information for citizens to secure access to information

under the control of public authorities, in order to promote transparency and accountability in the working of every public authority.

9. Section 2(a) defines "appropriate Government" as follows:-

"(a) "appropriate Government" means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly-

(i) by the Central Government or the Union territory administration, the Central Government;

(ii) by the State Government, the State Government."

10. The term "public authority" has been defined in Section 2(h), which reads as under:

"2(h) 'public authority" means any authority or body or institution of self-government established or constituted-

(a) by or under the Constitution;

(b) by any other law made by Parliament;

(c) by any other law made by State Legislature;

(d) by notification issued or order made by the appropriate Government,

and includes any-

(i) body owned, controlled or substantially financed;

(ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government."

11. The term "public authority", as defined in Section 2(h) of the RTI Act, would therefore mean any authority or body or institution established or constituted apart from other things, by the notification issued by an order made by the appropriate Government. It includes even a body owned, controlled or substantially financed directly or indirectly by the funds provided by the appropriate Government. Even non-Government organizations substantially financed, directly or indirectly by the funds provided by the appropriate Government would come within the ambit of "public authority", as defined in Section 2(h) of the RTI Act.

12. In the present case, admittedly the petitioner company is a subsidiary of GRIDCO, which is a wholly owned Government company, which holds 49% equity in the 4 distribution companies, including the petitioner company, who are engaged in distribution and supply of electricity in different parts of Orissa under licences granted to them by the OERC, as per the 1998 Rules. Rule 6 of the said 1998 Rules provides that all the suits, proceedings etc. pending against GRIDCO on and from the appointed date, with regard to distribution business or a distribution undertaking, which are transferred to the 4 distribution companies including the petitioner company shall not abate or discontinue and the same shall be continued, prosecuted and enforced by or against the concerned distribution company, in the same manner and to the same extent, as it would or might have been continued,

prosecuted and enforced by or against GRIDCO, if the transfers provided for in the said 1998 Rules had not been made. Furthermore, the petitioner company as well as the other 3 distribution companies execute different schemes sponsored by the Central and the State Government, the funds of which are provided by the appropriate Government. The 4 distribution companies, including the petitioner company have been created under the aforementioned 1998 Rules, which was framed by the State Government for the purpose of providing and giving effect to the preparation and implementation of the scheme for transfer of distribution undertakings of the GRIDCO to the said 4 distribution companies. The said 4 distribution companies are governed by the different rules and regulations framed by the State Government, for supply and distribution of electricity in the State of Orissa under the Electricity Act, 2003 and Orissa Electricity Reform Act 1995. The performance of the distribution companies and the rate of tariff to be collected by them are regulated by OERC. Moreover, the 4 distribution companies, including the petitioner company are discharging governmental functions of distribution and supply of electricity to the people of the State, which is an essential public duty. All these go to show that the State Government has a deep and pervasive control over all the 4 distribution companies including the petitioner and such control is not mere regulatory.

13. In view of the above, we are of the considered opinion that the petitioner company is a “public authority” and therefore the decision of the State Government in the Energy Department, as communicated to the petitioner vide letter dated 17.12.2005 (Annexure-2), holding that the petitioner company falls within the definition of “public authority” as defined in the RTI Act, cannot be faulted.

14. The writ application being devoid of merit, the same is accordingly dismissed.

Writ petition dismissed.

2010 (I) ILR-CUT- I74

L.MOHAPATRA,J. & B.N.MAHAPATRA,J.

GAYADHAR MOHANTY -V- O.A.T.,CHAIRMAN,BBSR & ORS.*

OCTOBER 9,2009.

CONSTITUTION OF INDIA, 1950 - ART.311.

Dismissal from service – Petitioner along with another Constable took the UTP from the hazat without the knowledge of C.S.I. during his temporary absence and the UTP escaped while in custody – Sufficient precaution in putting handcuffs in both the hands of the prisoner had not been taken – The petitioner did not raise any hue and cry when the UTP escaped – Considering the gravity of the charge and the conduct of the petitioner this Court held the punishment imposed by the disciplinary authority is not shockingly disproportionate so as to substitute the punishment.

(Para 9)

For Petitioner – M/s.N.Patra, A.K.Patra & B.N.Sarangi.
M/s.K.P.Bhowmik & A.R.J.Sharma.

For Opp.Parties – Addl.Govt.Advocate.

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*O.J.C. NO.4376 OF 2000. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA, J. This writ application is directed against the order dated 1.3.2000 passed by the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.48(C) of 1995.

2. The petitioner having been dismissed from service in pursuance of a disciplinary proceeding, had approached the Tribunal in the aforesaid O.A. challenging the said order of dismissal from service. The O.A. having been dismissed by the Tribunal, this writ application has been filed.

3. The petitioner was working as a Police Constable attached to Sadar Court of Balasore at the relevant time. A disciplinary proceeding was drawn up against him for negligence and dereliction of duty thereby causing escape of an under trial prisoner namely, Ramesh Chandra Behera @ Santosh Das @ Ashok Das @ Rabindra Parida @ Rabindra Behera @ Santosh Parida of Sanbisol Police Station at Kaptipada in the district of Mayurbhanj. An inquiry was conducted by the Reserve Inspector of Police and on conclusion of inquiry, the petitioner was found guilty of the charge and, accordingly, a report was submitted before the disciplinary authority. The disciplinary authority on consideration of the inquiry report dismissed the petitioner from service as a measure of punishment. The petitioner preferred an appeal against the order of dismissal before the D.I.G.. When there was delay in disposal of the appeal, the present O.A. was filed. During pendency of the O.A., the appeal before the D.I.G. was disposed of and was rejected. Before the Tribunal, the petitioner challenged the order of dismissal on the ground

of non-supply of statement of defence witness R.K.Dutta and also on the ground of insufficiency of evidence. It was contended by the learned counsel for the petitioner before the Tribunal that there is no satisfactory evidence that the U.T.P. had been taken by the petitioner without consent of C.S.I. or that there has been no observance of P.M.R.295(a). The relevant register like Hazat Register and I.C. warrants were not produced before the Inquiry Officer and in absence of the said documents, the petitioner could not have been found guilty of the charge of negligence or dereliction of duty.

4. A counter affidavit was filed before the Tribunal by the opposite parties challenging maintainability of the O.A., which had been filed prior to disposal of the appeal preferred before the D.I.G. against the order of dismissal. It was also contended in the counter affidavit that not only the petitioner but also another Constable P.C.Naik had taken the U.T.P from Sadar Court Office, Balasore for production before the Magistrate, First Class and the U.T.P. escaped from custody of these two Constables. Proceedings were initiated against both of them but in course of proceeding, the other Constable namely, P.C.Naik died, as a result of which, he was not proceeded any further. The allegation of the petitioner that he was not supplied with the required documents was stoutly denied.

5. The Tribunal in paragraph-6 of the order found the O.A. to be maintainable even though the same had been filed during pendency of the appeal before the D.I.G. Police. So far as other ground taken regarding non-supply of statement of defence witness or insufficiency of evidence is concerned, on perusal of the record, the Tribunal did not find any reason to interfere with the findings of the inquiry officer and, accordingly, dismissed the O.A.

6. The learned counsel for the petitioner assailed the impugned order of the Tribunal on the following two grounds:-

1) The evidence adduced in course of the departmental proceeding do not clearly establish that the petitioner along with the aforesaid Constable P.C.Naik had taken the U.T.P. without consent of C.S.I. for production before the learned Magistrate when the U.T.P. escaped.
2) The punishment imposed is shockingly disproportionate considering the gravity of the charge.

The learned counsel for the State submitted that there was no irregularity in course of the departmental proceeding and the petitioner participated in the proceeding till end. Therefore, it is not open for him now to say that the statement of defence witness was not supplied to him or that some relevant documents were not given to him. So far as quantum of punishment is concerned, it was contended by the learned counsel for the State that considering the nature of lapses in a department like Police,

punishment is appropriate and, therefore, this Court may not interfere with the punishment imposed by the disciplinary authority.

7. So far as first ground taken by the learned counsel for the petitioner is concerned, we find the following charge was framed against him in the departmental proceeding:-

> "While attached to Sadar court, Balasore on 7.5.91 at about 10.30 A.M. he along with C/978 Prafull Chandra Nayak took U.T.P. Ramesh Chandra Behera @ Santosh Das @ Ashok Das @Rabindra Parida @Rabindra Behera @ Santosh Parida of Sanbisol, P.S.Kaptipada, Dist-Mayurbhanj from the Sadar court office, Balasore without the knowledge of the C.S.I. Sadar court, Balasore with a handcuff on the plea of producing him in the court of Sri Subash Chandra Rath, J.M.F.C., Balasore in Balasore Town P.S.Case No.96 dt.7.5.1991 u/s.224 IPC (G.R.Case No.411/91) without any intermediate custody warrant. At 10.40 A.M. on the same date the said U.T.P. was allowed to escape from the court office verandah leaving behind the hand-cuff of the western side of the court of S.D.J.M., Balasore which was subsequently found by Sri Manoranjan Acharya, Peon of the court of S.D.J.M., Balasore who produced the same handcuff to the C.S.I. Sadar court, Balasore."

8. The petitioner denied the charge and contested the proceeding. In course of the said proceeding, witnesses were examined on behalf of the department and it is found from the statement of the C.S.I. that on 7.5.1991 the petitioner was on hazat duty whereas Constable P.C.Naik was detailed for escort duty along with one R.C.Jena. Exhibit-2 is the document acknowledging such duty. The U.T.P. was brought from the jail for his production in different courts and was kept inside the hazat. The C.S.I. in his evidence has stated that without his permission, during his temporary absence, he was reported by R.C.Jena that the U.T.P was taken to court of Sri Subash Chandra Rath, J.M.F.C., for production by the petitioner and Shri P.C.Naik. This was as per the sweet will of the said two constables but without knowledge of the C.S.I.. The said U.T.P escaped while in custody of these two constables. The petitioner and P.C. Naik on being questioned, reported before the C.S.I. that the U.T.P. wanted to urinate and they took to him to the backside building of the court but all of a sudden, the U.T.P. started running towards the Bazar side and in spite of their efforts, he could not be caught. The C.S.I., who has deposed in the above manner, was not practically cross-examined. Another witness namely, Promod Kumar Ramsingh has stated that sufficient precaution in putting handcuffs in both the hands of the prisoner had not been taken. The constables also did not raise any hue and cry when the U.T.P. escaped. The other witnesses examined in course of the proceeding also supported the case of the

Department. Some of the witnesses were cross-examined and in respect of some other witnesses, cross-examination was denied. On the basis of such evidence adduced in course of the inquiry, a report was submitted finding the petitioner guilty of the charge. Considering the nature of evidence adduced before the inquiry officer, we are of the view that the Department has been able to adduce sufficient evidence to prove the charge. The petitioner also appears to have participated in the proceeding by cross-examining some of the witnesses and declining to cross examine some of them. Annexures attached to the writ application do not indicate that at any point of time the petitioner complained of non-supply of statement of defence witness or documents. Therefore, so far as first ground is concerned, we do not find any substance whatsoever. Apart from the above, law is well settled that this Court cannot sit in appeal and find out sufficiency/insufficiency of evidence in support of the charge. Only when it is a case of no evidence, this Court may interfere with the order of punishment. The petitioner has not been able to bring his case within the purview of such grounds for interference and, therefore the findings of the inquiry officer on the basis of evidence adduced before him, cannot be said to be without any basis.

9. So far as second ground is concerned, law is well settled that the High Court cannot substitute a punishment unless the punishment imposed by the disciplinary authority is found to be shockingly disproportionate to the gravity of the charge. In this case, the charge is that the petitioner along with the deceased Constable P.C.Naik took the U.T.P. from the hazat without knowledge of the C.S.I. during his temporary absence and the U.T.P. escaped while in custody. Considering the gravity of the charge and the conduct of the petitioner in this regard, we are of the view that the punishment imposed by the disciplinary authority is not shockingly disproportionate to the gravity of the charge.

10. We accordingly having found no substance in the contention of the learned counsel for the petitioner on both the grounds, dismiss the writ application.

Writ petition dismissed.

2010 (I) ILR-CUT- I78

L.MOHAPATRA,J & B.N.MAHAPATRA,J.

STATE OF ORISSA & ORS. -V- PRADIPTA KUMAR SAMANTRA.*

OCTOBER 14,2009.

CONSTITUTION OF INDIA,1950 – ART.309, 311.

Temporary appointments – Termination of service of such employee – No need to issue a notice to show cause before terminating the services of such employees – Held, Tribunal was not justified by holding that O.P.1 who was holding a tenure post had a right of notice before the order of termination was passed. (Para 5)

Case laws Referred to:-

1.(1992)3 SCC 526 : (Dr.I.P.Agarwal -V-Union of India & Ors.)
2.AIR 1995 SC 768 : (State of U.P. & Anr.-V-Dr.S.K.Sinha & Ors.).
3.AIR 1992 SC 1593 : (State of Punjab & Ors.-V-Surinder Kumar Singh & Ors.)
4.AIR 1987 SC 2408 : (R.K.-V-U.P.State Handloom Corporation).
5.AIR 1992 SC 496 : (Triveni Shankar Saxena -V-State of U.P. & Ors.).

For Petitioner – Addl.Govt.Advocate.
For Opp.Party – M/s.K.Patnaik, R.Samal & S.Patnaik. (For O.P.No.1).

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*W.P.(C) NO.1772 OF 2002. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA, J. The State and its functionaries are the petitioners before this Court assailing the order of the Orissa Administrative Tribunal, Bhubaneswar dated 20th March,2002 passed in O.A.No.1878 of 2001 filed by opposite party no.1.

2. Opposite party no.1 was appointed as Field-man Demonstrator on ad hoc basis for 89 days against an existing reserved vacancy caused due to promotion of the incumbent by order dated 2nd April,1994. Again by order dated 31.7.1994 he was given a fresh appointment in the same capacity for a further period of 60 days. While continuing on ad hoc basis in the manner stated above, he approached the Tribunal in O.A.No.2271 of 1994 for regularization of his services. The said O.A. was disposed of as withdrawn on 6.7.1999. Because of pendency of the O.A. filed by him, he was allowed to continue on ad hoc basis. Thereafter by order dated 10.12.2001 he was terminated from service on the ground of having been appointed irregularly. While O.A.No.2271 of 1994 was pending before the Bhubaneswar Bench, opposite party no.1 also filed O.A.No.1923(C) of 1991 before the Cuttack Bench, Cuttack for quashing the order dated 8.6.2001 in which the Agriculture Department directed the Director, Soil Conservation to terminate all irregular appointees. Further during pendency of the said O.A.No.1923(C) of 2001, the order of termination having been passed, opposite party no.1

filed the present O.A. challenging the order of termination. His case before the Tribunal was that he was not an irregular appointee and his services had been regularized with effect from 31.7.1996. His services having been regularized, he could not be treated as an irregular appointee and his services could not be terminated without issuing a notice to show cause.

3. From the impugned order it appears that a note of submission was filed on behalf of the present petitioners before the Tribunal wherein it was stated that the Assistant Soil Conservation Officer is the appointing authority for Field-man Demonstrators and the opposite party no.1 had been appointed irregularly for which under the orders of the Department his services were terminated. The Tribunal in the impugned order though observed that there is no document indicating regularization of opposite party no.1 in service, allowed the O.A. solely on the ground that opposite party no.1 having worked on ad hoc basis for a considerable length of time, his termination from service without a notice to show cause is illegal.

4. Learned counsel for the State assailed the impugned order on the ground that opposite party no.1 had been appointed on ad hoc basis against a sanctioned vacancy on tenure basis, which was being extended from time to time. He having no right to hold the post, is also not entitled to a notice prior to termination of his service.

None appeared for opposite party no.1 at the time of hearing.

5. Annexure-1 to the writ application shows that opposite party no.1 was appointed on ad hoc basis against an existing reserved vacancy for a period of 89 days vide order dated 2.4.1994 and under Annexure-2 by order dated 31.7.1994 he was given a fresh appointment for a further period of sixty days. While the matter stood thus, he approached the Tribunal in O.A. No.2271 of 1994 for regularization of his services. The Department did not dispense with his services because of pendency of the said O.A. As is evident from Annexure-3, only after the said O.A. was withdrawn on 6.7.1999, steps were taken for removing irregular appointees including the petitioner and his services were terminated in 2001. The question for consideration is as to whether opposite party no.1 is entitled for a notice before the order of termination was passed or not. Annexures 1 and 2 clearly indicate that the appointment was for a specified period and in case of tenure appointments, law is well settled that the services comes to end on expiry of the period. In case of ***Dr. L.P.Agarwal Vrs. Union of India and others*** reported in (1992) 3 S.C.C. 526 and in the case of ***State of U.P. and another Vrs. Dr.S.K.Sinha and Others*** reported in AIR 1995 SC 768, the Apex Court observed that if one is appointed for a tenure, it comes to an end automatically and does not require any order of termination by the employer. In the case of ***State of Punjab and others Vrs. Surinder Kumar Singh and others*** reported in AIR 1992 SC 1593, the Court observed that an

employee appointed for a tenure, his service is not governed by any statutory rules, and he is bound by the terms and conditions incorporated in his appointment letter and there is no reason why the Court should not enforce the same. Alternatively, if such ad hoc appointment of opposite party no.1 is treated to be temporary appointment, law is well settled that such employee has no right to hold the post and he is not entitled for any opportunity of hearing before the services are dispensed with as his termination does not amount forfeiture of any legal right. In this connection, reference may be made to the decisions of the Apex Court in the cases of ***R.K. Vrs. U.P. State Handloom Corporation*** reported in AIR 1987 SC 2408, ***Triveni Shankar Saxena Vrs. State of U.P and Others*** reported in AIR 1992 SC 496 and ***Madhya Pradesh Hast Shilpa Vikas Nigam Ltd. Vrs. Devendra Kumar Jain and another*** reported in (1995) 1 SCC 638. In view of the law laid down by the Apex Court in case of tenure appointments and temporary appointments, there is no need to issue a notice to show cause before terminating the services of such employee and, therefore the Tribunal was not justified holding that opposite party no.1, who was holding a tenure post or had been appointed on temporary basis for a specified period, had a right of notice before the order of termination was passed.

6. Accordingly, we allow the writ application and set aside the impugned judgment.

Writ petition allowed.

2010 (I) ILR-CUT- I81

L.MOHAPATRA,J & B.N.MAHAPATRA,J.

SURYA PRAKASH MOHAPATRA -V- SECRETARY, ORISSA STAFF SELECTION COMMISSION & ORS.*

OCTOBER 14,2009.

Service – Petitioner not eligible for the post but he was called to sit in the written examination – Direction issued to Opp.Parties to consider for appointment of the petitioner in any other post or pay him compensation of Rs.50,000/- for the mistake in inviting him for written test and causing mental agony.

(para 7)

Case laws Referred to:-

1.AIR 1993 SC 1906 : (Jai Shankar Prasad -V-State of Bihar & Ors.).
2.(2005) 1 PDD(CC) 243 : (Dalbir Singh Bagga -V-State of Punjab & Ors.).
3.98(2004)CLT 716 : (Orissa Association for the Blind & Ors.-V-State of Orissa & Ors.).

For Petitioner – In person.
For Opp.Parties – Addl.Govt.Advocate (For O.Ps.3,4 & 5).

*W.P.(C) NO.8127 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

L.MOHAPATRA, J. The petitioner, who was the applicant before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack in O.A.No.505(C) of 2008, assails the legality of the order passed by the Tribunal in the said Original Application in this writ application.

2. The petitioner is a disabled person being blind had applied for appointment to the post of Inspector of Supplies and Inspector of Weights and Measure for which applications had been invited from eligible candidates by the Orissa Staff Selection Commission, Bhubaneswar vide advertisement No.2379/OSSC dtd.23.10.2007. The advertisement prescribed that there would be reservation of two posts for Physically Handicapped and disabled candidates. The petitioner having submitted his application for appointment to the said post, was allowed to appear in the written examination. He being blind in both eyes, was allowed to take a scribe during the examination. The normal time to answer the papers as allowed to other candidates was also allowed to the petitioner. He having not been selected approached the Tribunal on the ground that under the relevant Circular, he should have been allowed twenty minutes more in each hour of examination and is also entitled for appointment directly without facing any test and should also have been given 16.54 grace marks.

3. A counter affidavit was filed by the State authorities before the Tribunal and it was stated therein that for handicapped reserved category of posts the State Government in G.A. Department Resolution dated 13.2.2006 specified

the suitability of different kinds of handicapped/ disabled persons for different posts and the said Resolution does not specify blind persons to be eligible for appointment to the post advertised for i.e. Inspector of Supplies and Inspector of Weights and Measure. Therefore, the petitioner was not eligible to apply for the post as Physically Handicapped Person and, accordingly, has no right to claim appointment even though he was allowed to appear in the written test with the help of a scribe.

4. The Tribunal with reference to the G.A. Department Resolution dated 13.2.2006 held that the petitioner was not eligible for appointment to the post of Supply Inspector or Inspector of Weights and Measure and, therefore, he has no right to claim appointment against the said post. Inviting the petitioner to appear in the written test was a mistake and, therefore, the petitioner cannot take advantage of such mistake on the part of the opposite parties. With the above observations, the O.A. having been dismissed, the petitioner has approached this Court.

5. The petitioner, who appeared in person at the time of hearing, assailed the impugned judgment on the ground that his non-selection to the post was challenged on the ground of infraction of relevant Circulars and it was never the case before the Tribunal as to whether the petitioner is eligible to be appointed against the post of Inspector of supplies or Inspector of Weights and Measure. According to the petitioner, the advertisement prescribed for reservation of two posts for Physically Handicapped Persons and, accordingly, he was eligible to apply for the post. He having been allowed to appear in the written test with the help of a scribe, it is no more open for the opposite parties to take a stand that he was not eligible for appointment to such post. The petitioner referred to certain Circulars/Resolution of the Central as well as State Government and also referred to some decisions in support of his claim.

Learned counsel for the State in support of the impugned judgment drew attention of the Court to the Resolution of the G.A. Department dated 13.2.2006 and submitted that for the post of Inspector of Supplies, a blind person is not eligible for consideration and this having escaped from the notice of the opposite parties, the petitioner was called to appear in the written test by mistake and, accordingly, he cannot take advantage of the same.

6. The undisputed facts are that the Orissa Staff Selection Commission, Bhubaneswar published an advertisement calling for applications for appointment to 71 posts of Inspector of Supplies and 19 posts of Inspector of Weights and Measure (Legal Metrology) in October,2007. Clause-2 (a) of the advertisement relates to vacancy position of Inspector of Supplies. It also prescribes that out of the said vacancies, two are reserved for Physically Handicapped Persons. The petitioner being otherwise eligible in terms of the

advertisement, applied for appointment to the post of Inspector of Supplies against the reserved vacancy meant for Physically Handicapped Persons. The petitioner was also called to appear in the written test and was allowed to take help of a scribe in course of the written examination.

The petitioner submitted that he having been allowed to take the written test, should have been allowed twenty minutes extra time for each hour of examination as provided in the Office Memorandum dated 25th July,1978 issued by the Ministry of Home Affairs, Department of Personnel and A.R., Government of India. The petitioner also contended that he having not been allowed extra time, he could not qualify in the written examination and, therefore, was not given appointment.

7. Learned counsel for the State submitted that the Office Memorandum relied upon by the petitioner has no application since the same has not been adopted by the State Government. We are unable to accept such contention since the Office Memorandum in Annexure-7 dated 25th July,1978 clearly states that the guidelines issued in the Office Memorandum are for recruitment of Blind, Deaf-Mute and Orthopaedically Handicapped Persons for appointment to Class-III and IV(now Group 'C' and 'D') posts under the Central and State Government. Therefore, there is some force in the contention of the petitioner that he should have been allowed 20 minutes extra time for each hour of examination in terms of the said Office Memorandum. On this ground alone, we could have directed the opposite parties to reconsider the case of the petitioner by giving him another opportunity to take the written test in terms of the aforesaid Office Memorandum. We are not able to do so because of the fact that even if the petitioner succeeds in the written examination, he may not be in a position to get an appointment as Inspector of Supplies on the face of the Resolution of the G.A. Department of the State Government dated 13th February, 2006. The Resolution of G.A. Department as stated above, has been annexed to the writ application as Annexure-10. The said Resolution shows that consequent upon the decision of the Government of India in the year 1978, the State Government made reservation of 1% of vacancies for rehabilitation of physically handicapped persons in the public service. Taking note of Section 32 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, a list of posts meant for different disabilities has been prepared. Entry No.188 in the list relates to Inspector of Supplies. As is evident from the said entry, the following categories of disabled persons are eligible to be appointed as Inspector of Supplies :- One Arm (OA), One Leg (OL),Partial Deaf(PD) (with suitable aid), Low Vision(LV) and both legs affected but no Arms, BL (Mobility not be restricted). Blind persons are not eligible to apply for the said post. The said Resolution of G.A. Department had come into force much before the

advertisement was issued for appointment and, therefore, calling the petitioner to appear in the written test was definitely a mistake on the part of the opposite parties. Merely because the petitioner was permitted to take the written test does not necessarily mean that he has right to appointment. The petitioner relied on a decision of the Apex Court in the case of ***Jai Shankar Prasad Vrs. State of Bihar and others*** reported in AIR 1993 SC 1906. The petitioner therein was a member of the Bar. He filed a writ petition before the High Court of Patna in the nature of a Public Interest Litigation praying for issuance of writ of quo-warranto challenging the appointment of Dr.Shiva Jatan Thakur as a Member of Bihar Public Service Commission on two grounds and one of the ground was that the said Shiva Jatan Thakur was totally blind and was not fit to be appointed by reason of the said physical infirmity. In paragraph-5 of the judgment, the Hon'ble Supreme Court observed that Dr.Shiva Jatan Thakur was blind from his childhood and in spite of blindness, he acquired high educational qualifications and at the time of his appointment, he was working as Associate Professor in the Patna University. The Court also observed that his blindness has not affected the work of the Commission efficiently and, accordingly, dismissed the Civil Appeal. This decision may not have application in the facts of the present case as holding the post of Inspector of supplies, one is required to go to the field and discharge such nature of duties which may be difficult on the part of a blind person to do. Considering such nature of duties attached to the post of Inspector of Supplies, blind persons have been excluded in the G.A. Department Resolution in Annexure-10. There is no doubt that the blind persons are capable to discharge several other types of duties very efficiently and the Resolution under Annexure-10 also shows that post of Assistant Director, SIRD, the post of Lecturer in Arts and the post of Information Assistant can be managed by the blind persons and, accordingly, reservations have been provided for them. So far as the nature of duties attached to the post of Inspector of Supplies is concerned, it may not be possible on the part of the blind persons to discharge such duties. The petitioner also relied on a decision of the Punjab and Haryana High Court in the case of ***Dalbir Singh Bagga Vrs. State of Punjab and others*** reported in (2005) 1PDD(CC) 243. In the said reported case, the petitioner was a polio victim and had physically deficit of 60%. He graduated in Electrical Engineering and was a candidate for recruitment against 100 posts of Assistant Engineers advertised by the Punjab State Electricity Board in the year 1998. The advertisement did not prescribe for reservation of any post for physically handicapped persons. The petitioner therein had to apply as a general category candidate and was called for the interview. He was not selected and, accordingly, approached the High Court on the ground that the Board should have reserved seats for physically handicapped persons and

no provision in the advertisement having been made to the said effect, the same violates the instructions issued by the State Government vide letter dated 21st August,1997. In paragraph-15 of the judgment, it was held that the Act of 1995 meant for the physically handicapped persons is a piece of welfare legislation and it intended to secure the object which runs through the Constitution and is embodied in Article 14. Taking note of Sections 32 and 33 of 1995 Act, the High Court allowed the writ application and directed the Electricity Board to consider the case of the petitioner therein against an existing vacancy or any vacancy that may become available in the immediate future. The said decision is distinguishable considering the fact that the Board while issuing advertisement had adopted the instruction issued by the State Government under the provisions of 1995 Act only for the cadre of Ministerial Staff, account staff and peon but not to other posts. In the present case, reservation has been made for physically handicapped persons but the posts advertised is only to be filled up by such physically handicapped persons as mentioned in the Resolution under Annexure-10. The other decision relied upon by the petitioner is of this Court in the case of ***Orissa Association for the Blind and others Vrs. State of Orissa and others*** reported in 98(2004)CLT 716 . Referring Section 32 of the 1995 Act, this Court directed the respective Collectors to consider the candidature of blind candidates and other similarly placed candidates under reserved category strictly in accordance with Section 33 of the 1995 Act and the Resolution of the State Government dated 4.5.1981. This decision may not be of much help to the petitioner so far as the post of Inspector of Supplies is concerned.

8. In view of the discussions made above, we are of the view that inviting the petitioner for appearing in the written test meant for the post of Inspector of Supplies was a mistake on the part of the opposite parties, the petitioner not being eligible for consideration for appointment to such post in view of the G.A. Department Resolution dated 13th February,2006 under Annexure-10. However, the petitioner was eligible to be appointed against any other Group 'C' post that may be available under the State Government and unless such eligible blind persons are considered for appointment against the post which they can man, the entire purpose of 1995 Act stands frustrated.

9. We therefore while declining to interfere with the impugned order, dispose of the writ application with the following directions:-

The opposite parties may consider for appointing the petitioner in any other Group 'C' post for which he is found suitable within a period of four months from the date of communication of this order or pay him compensation of Rs.50,000/-(Fifty thousand) for inviting him to take the written test and causing mental agony resulting in litigations.

2010 (I) ILR-CUT- I86

L.MOHAPATRA, J & B.K.PATEL, J.

SAGARIKA DEBATA @ SATPATHY -V- SATYANARAYAN DEBATA & ANR.*

DECEMBER 22.2009.

(A) HINDU MARRIAGE ACT, 1955 (ACT NO.25 OF 1955) – SEC.13 (1)(ia), 23(1)(b).

Divorce decree – Doctrine of condonation – Condoation measns forgiveness of the matrimonial offence and the restoration of the offending spouse to the same position as he or she occupied before the offence was committed – To constitute condonation there must be two things i.e. forgiveness and restoration – Reinstatement of the offending spouse is a prime requirement of the doctrine of "Condonation" and mere forgiveness of the matrimonial offence is not sufficient to conclude condonation – Condonation implies a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation.

In the present case there is no material on record to indicate resumption of conjugal life between the appellant and the respondent No.1, rather their relationship is found to have remained bitter and stained – Held, this Court finds no material basis to sustain the defence of condonation. (Para 11)

(**B) FAMILY COURTS ACT, 1984 (ACT NO. OF 1984) – SEC.14**

Consideration of evidence by a Family Court is not restricted by the rules of relevancy or admissibility provided under the Indian Evidence Act. (Para 10)

Case Laws Referred to:-

1.AIR 1992 Rajasthan 57 : (Shishupal -V- Manak Chand).
2.AIR 1988 Allahabad 55 : (Long Life Carpet Industries, Gaharpur & Ors.-V-Smt.Kesar Jahan).
3.AIR 1978 M adras 415 : (D.Thomas -V- Tara.)
4.1988 (1)DMC 433(438)(FB) : (Lal Changmungu -V-Lilanpari)
5.2005 AICH 1466 : (Jaban Prasad Shaw & Ors.-V-Jharana Ghose).
6.AIR 1975 SC 1534 : (Dr.N.G.Dastane -V- Mrs.S.Dastane).
7.AIR 1987 Gauhati 90 : (Smt.Minakshi Dhar -V- Biresh Ranjan Dhar).

For Appellant – M/s.S.K.Dash, A.K.Otta, S.K.Dash & A.Dhalasamanta.
For Respondents – M/s.Pravakar Jena, Sailabala Jena & A.R.Behera.

*MATA NO. 58 OF 2007. From the judgment and order dated 29.9.2007 passed by Sri S.K.Mishra, Judge, Family Court, Cuttack in Civil Proceeding No.200 of 2001

.***B.K. PATEL, J.*** This appeal is directed against the judgment dated 29.09.2007 passed by the learned Judge, Family Court, Cuttack in Civil

Proceeding No.200/2001 directing dissolution of marriage between the appellant and respondent no.1.

2. Appellant-wife and respondent no.1-husband are Hindus. Marriage between them was solemnized on 23.06.1997 according to Hindu rites and customs. They were blessed with a daughter on 23.12.1998 Respondent nos.1 and 2, both of whom belong to Orissa, were members of

Indian Air Force. Civil Proceeding No.200/2001 was instituted for a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 read with Section 7 of the Family Court Act by the respondent no.1 against the appellant and respondent no.2. It is also not disputed that on the basis of allegations made by respondent no.1 a proceeding of Board of Officers, Court of Inquiry of the Indian Air Force was conducted against respondent no.2.

3. In his application before the Family Court respondent no.1 averred that appellant came from a rich family and her behaviour towards her husband and his relations was not good. However, he tolerated her conduct with the hope that she would amend herself in course of time. Subsequently, respondent no.1 could learn that appellant had no liking towards defence personnel for which she refused to cohabitate at times. After birth of their daughter, respondent no.1 took his family to his place of posting at Secunderabad. While residing there, they came in contact with respondent no.2 and his wife in the month of February,1999. Their relationship became intimate and respondent no.2 started visiting their house frequently even in absence of the respondent no.1. At the behest of respondent no.2, respondent no.1 occupied a house adjacent to his house during the month of June,2000. All in a sudden on 24.9.2000 respondent no.2's wife reported to the respondent no.1 in presence of the appellant that she was an eyewitness to the illicit relationship between the appellant and the respondent no.2 on 23.9.2000 and that such relationship created disturbance in her relationship with the respondent no.2. It was further pleaded that on being asked by respondent no.1 both appellant as well as respondent no.2 confessed of having regular voluntary sexual intercourse with each other since one year. Both of them also elaborated regarding their relationship before Respondent no.1's father and father-in-law on 28.9.2000 over phone. On 16.12.2000 the conduct of the respondent no.2 was brought to the notice of the Air Officer Commanding, Secunderabad for initiation of disciplinary proceeding and for the purpose a Court of Enquiry was held. In course of enquiry appellant admitted that she used to have voluntary sexual intercourse with the respondent no.2.

4. In her written statement appellant denied the allegations made against her by the respondent no.1 and made counter allegations against him. It was asserted by her that though cash of Rs.60,000/-, refrigerator, Godrej

Imirah, gold ornaments etc. were given in dowry at the time of her marriage, respondent no.1 and his family members were not satisfied with the dowry as well as customary gifts. It was asserted by her that she stayed in Secunderabad with respondent no.1 from September,1997 to February,1998; from July,1998 to March,1999; from August,1999 to April,2000; from July,2000 to October,2000 and from December,2000 to March,2001 and that their daughter was born at Secunderabad. She categorically denied the allegations of her misconduct towards respondent no.1 and his family members and of adultery with respondent no.2. She denied to have made any confession and asserted that respondent no.2 was living a happy conjugal life. She also denied to have admitted in course of any official enquiry to have sexual intercourse with respondent no.2. She alleged that respondent no.1 not only was demanding more dowry but also used to assault her and that his family members supported him. They expressed discontentment against the appellant for giving birth to a daughter instead of a son. It was further alleged by the appellant that respondent no.1 used to drink and assault her ruthlessly. On many occasions, respondent no.1 disclosed before her that he wanted to marry another girl and that his marriage with the appellant was solemnized against his will. Even after his marriage respondent no.1 continued to maintain his relationship with said girl and wanted to marry her. In order to fulfil his evil intention respondent no.1 coerced the appellant to give in writing that she was living in adultery. On being subjected to physical assault and mental cruelty, appellant made oral and written admissions against her will. It was further alleged that on 15.3.2001 respondent no.1 left the appellant and her daughter at Chandikhol Chhak in a helpless condition and told that she should take poison so that he could marry for the second time. The appellant had aversion towards smell of alcohol for which she tried to persuade respondent no.1 many a times to give up habit of drinking. However, respondent no.1 used to force the appellant to take liquor before cohabitation.

5. Respondent no.2 also filed written statement denying allegations of adultery with the appellant. He admitted that there was friendship between him and respondent no.1, but denied to have visited his house in his absence. It was averred that during the later part of 2000 there was some dispute between him and respondent no.1 due to monetary transaction which culminated in initiation of disciplinary proceeding against respondent no.2 on the basis of false allegations made by the respondent no.1.

6. It appears that respondent no.2 did not participate in the hearing and was set exparte by order dated 7.1.2005. In order to substantiate his assertions respondent no.1 examined himself as P.W.2 and his father as P.W.1 apart from relying upon Ext.1, statement in writing by appellant.

Appellant examined herself as O.P.W.no.2, her father as O.P.W.1 and her mother as O.P.W.3. Two letters marked Exts. A and B were also admitted into evidence on her behalf. In course of hearing, on being called for, xerox copy of the proceeding of Court of Enquiry against respondent no.2 containing appellant's admission of adultery bearing her signature marked "X' was received from the Air Force Station, Hakimpet, Secunderabad. Learned Judge, Family Court, Cuttack placing reliance on evidence of respondent no.1 and appellant's admission in Ext.1 as well as before the Court of Enquiry, stated to have been corroborated by the evidence adduced on behalf of the appellant also, passed the impugned judgment.

7. The impugned judgment was assailed by the learned counsel for the appellant firstly on the basis of his contention that respondent no.2 was not made a party to the hearing in the divorce proceeding. It was submitted that though respondent no.2 appeared and filed written statement at the initial stage, the proceeding had been dismissed for default subsequently. After restoration of the proceeding no step was taken to secure participation of respondent no.2. Relying upon decisions in ***Shishupal –v- Manak Chand***: AIR 1992 Rajasthan 57; ***Long Life Carpet Industries, Gaharpur and others –v- Smt.Kesar Jahan***: AIR 1988 Allahabad 55; ***D.Thomas –v- Tara***: AIR 1978 Madras 415; ***Lal Changmungu -vrs-Lilanpari***: 1988 (1) DMC 433 (438)(FB); and ***Jaban Prasad Shaw and others –v- Jharana Ghose***: 2005 AIHC 1466, it was contended by the learned counsel for the appellant that the decree of divorce passed in the absence of adulterer is unsustainable. It was next contended by the learned counsel for the appellant that learned trial court committed illegality in placing reliance on copies of the records of the proceeding in Court of Enquiry to conclude that the appellant had made admission of sexual relationship with respondent no.2. It was further contended that, assuming for the sake of argument that materials on record indicate that appellant committed adultery with respondent no.2, evidence on record also well establishes that respondent no.1 had condoned the appellant's conduct subsequently for which learned trial court ought to have held that the proceeding is not maintainable in view of provision under Section 23(1)(b) of the Hindu Marriage Act, 1955. In this context, learned counsel for the appellant relied upon decisions in ***Dr.N.G.Dastane –v- Mrs.S.Dastane***: AIR 1975 S.C.1534 and ***Smt. Minakshi Dhar –v- Biresh Ranjan Dhar***: AIR 1987 Gauhati 90.

In reply, learned counsel for the respondent no.1 contended that the learned trial court has assigned cogent reasons to reject all the contentions raised by the appellant in this appeal upon reference to evidence on record and relevant legal provisions.

8. We have perused the Lower Court Record carefully upon reference to rival contentions.

9. The contention relating to non-joinder of respondent no.2 deserves mention to be rejected only. Respondent no.2 not only entered appearance in response to summon but also filed written statement. The proceeding appears to have been dismissed for default on 10.10.2002. It was evident from order dated 19.07.2003 passed in the restoration proceeding bearing Misc. Case No.19 of 2003 that there was personal service of notice in restoration proceeding on respondent no.2. While restoring the proceeding by order dated 23.07.2003 respondent no.1 was directed to take step for appearance of respondents. However, respondent no.2 did not choose to participate in the hearing. By order dated 07.01.2005 respondent no.2 was, therefore, set exparte as he did not take any step. In such circumstances, there is no substance in the contention that in the divorce proceeding the alleged adulterer was not made a party. Respondent no.2 having been set exparte in presence of respondent no.1, the principles indicated in the decisions relied upon by the appellant are not applicable to the facts of the present case. There is no scope to contend that respondent no.2 was precluded from participating in the proceeding which culminated in the decree of divorce against the appellant.

10. One of the objectives in enacting Family Courts Act,1984 was stated to be to simplify the rules of evidence and procedure so as to enable a Family Court to deal effectively with a dispute. As has been pointed out in the impugned judgment, Section 14 of the Family Courts Act provides that a Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act,1872 (1 of 1872). Thus, consideration of evidence by a Family Court is not restricted by the rules of relevancy or admissibility provided under the Indian Evidence Act. In the present case, finding of adultery on the part of the appellant recorded by the learned trial court is substantially based on evidence of respondentno.1 relating to admission made by the appellant in course of the proceeding against respondentno.2 in the Court of Enquiry and in her statement Ext.1. Appellant did not deny the factum of such admissions but took the plea to have been coerced into making such admissions. Evidence of respondent no.1 is corroborated by contents of documents in the record of the proceeding received from the Air Force Station, Secunderabad and contents of Ext.1. Learned trial court also has taken note of contemporaneous conduct of appellant's father O.P.W.1 during the relevant period. Appellant appears to have categorically admitted regarding her relationship with respondent no.2 in course of the proceeding before the Court of Enquiry. She never raised complaint before the authorities conducting the Court of Enquiry of having been coerced to make such admissions. Rather, in

categorical terms she made admissions regarding adultery. We do not find any infirmity in the finding of the learned trial court that the appellant herself admitted of adultery with respondent no.2.

11. In the present case appellant altogether denied allegation of adultery in her written statement. She did not advance the plea of condonation as a defence to such allegation. Nonetheless, learned trial court considered the contention relating to condonation and rejected the same upon reference to evidence on record in accordance with law laid down in ***Dr.N.G.Dastane –v- Mrs.S.Dastane*** (supra) to the effect that even though condonation is not pleaded as defence by the respondent it is Court's duty, in view of the provisions under Section 23(1)(b) of the Hindu Marriage Act, 1955, to find whether the misconduct alleged to be the basis for seeking decree of divorce was condoned by the appellant. The contention relating to condonation raised on behalf of the appellant is based on respondent no.1's admission in course of cross-examination to the effect that he had given chance to the appellant to rectify her conduct till the end of Court of Enquiry and thereafter till filing of the case and that he was kind enough to respondent no.1 even after the incident till filing of the present proceeding. It was also pointed out that evidence on record reveals that the appellant alongwith her brother stayed in respondent no.1's quarters from the month of December, 2000 to 13/14 of March, 2001. However, as has been held in ***Dr.N.G.Dastane -v- Mrs.S.Dastane*** (supra) condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. Reinstatement of the offending spouse is a prime requirement of the doctrine and mere forgiveness of the matrimonial offence is not sufficient to conclude condonation. Condonation implies a complete reconciliation in the sense of reinstating the offender to conjugal cohabitation. In the present case, there is no material on record to indicate resumption of conjugal life between the appellant and respondent no.1. Rather, their relationship is found to have remained bitter and stained. Respondent no.1 pursued the proceeding against respondent no.2 in the Court of Enquiry and filed proceeding for divorce. Therefore, we find no material basis to sustain the defence of condonation.

12. Thus, we find no merit in any of the contentions raised on behalf of the appellant. Therefore, the impugned judgment is confirmed. Appeal is dismissed.

2010 (I) ILR-CUT- I92

L.MOHAPATRA,J & B.K.PATEL,J.

RAM PRIT SINGH -V- UNION OF INDIA & ORS.*

OCTOBER 28, 2009.

CONSTITUTION OF INDIA, 1950 – ART.311.

Disobeying the Command of the Shift-in-charge to blow whistle – Petitioner denied the allegation and explained that he did not blow whistle as it would disturb the near by residents - Though such explanation does not absolve the petitioner of the charge of disobedience it is relevant to consider the nature of punishment to be imposed – Punishment imposed appears to be disproportionate with the nature of misconduct established – Held, penalty imposed directing with holding of one increment is shockingly disproportionate and he should be let off with the punishment of censure or warning.

(Para 6)

Case laws Referred to:-

1.AIR 2007 SC 705 : (Government of India & Arn.-V-George Philip).

2.2009(1)OLR 483 : (Jogeswar Bagh – Registrar (Admn.) Orissa High Court & three Ors.).

For Petitioner – M/s.G.K.Behera & D.R.Mishra.

For Opp.Parties – Mr.Latatendu Jena (CGC).

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*W.P.(C) NO.13278 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India

B.K.PATEL, J. In this writ application the petitioner assails the legality of order of minor penalty of withholding one increment of pay for a period of one year without cumulative effect imposed on him by the Disciplinary Authority under Annexure-3 and confirmed by the Appellate Authority under Annexure-5 and by the Revisional Authority under Annexure-7.

2. Petitioner is a member of the Central Industrial Security Force (CISF) in the rank of Head Constable posted at TTPS, Talcher. Disciplinary proceeding was initiated against him on the following charge under Annexure-3:

> "CISF No. 801390049 HC/GD R.P. Singh of CISF Unit NTPC/TTPS Talcher was detailed from 2100 hrs on 17.07.2007 to 0500 hrs on 18.07.2007 at Watch Tower No. 5/Broken wall PTL with walkie-talkie set. SI/Exe P.C. Patnaik shift in-charge while after asking the situation report of the duty post over walkie talkie, passed instruction to HC/GD R.P. Singh to remain in contact with the sentry of debris-yard by blowing whistle. Hearing such instruction HC/GD R.P. Singh misbehaved with shift in-charge over walkie talkie and said "You are very fond of listening whistle? Should I blow whistle over walkie talkie? You have no work in control room and talking nonsense (BAKBAS) while sitting in control room." This has been

recorded in control room GD at about 0210 hrs vide GD No. 801 dated 18.07.2007. Such act on the part of HC/GD R.P. Singh shows sheer negligence, carelessness to his duty, indiscipline activity and misbehavior."

The petitioner filed written reply denying the charge. It was stated in the written reply that the petitioner was in contact with debris-yard sentry. It was further stated that the Shift-in-charge asked him over walkie talkie as to whether he was in possession of whistle or not to which the petitioner replied that it could be verified as to whether he was having whistle or not, and explained that if he blew whistle, employees of NTPS would feel bad. He denied to have any other conversation with the Shift-in-charge.

3. Considering the charge and reply to the same by the petitioner, Disciplinary Authority held the petitioner guilty of conduct which amounted to gross negligence towards his bonafide duty, highly indisciplined and indecent unbecoming of a member of disciplined force like CISF. Accordingly, punishment of withholding of one increment for a period of one year without the effect of postponing his future increment was awarded to the petitioner.

4. It was contended by the learned counsel for the petitioner that without any enquiry to find out veracity of allegation made by Shift-in-charge against the petitioner, the authorities should not have held the petitioner to be guilty of alleged misconduct. Explanation offered by the petitioner ought to have been accepted. It was further contended that taking into account the trivial nature of allegation made against the petitioner and the fact that the petitioner was a low paid subordinate staff of the CISF, instead of imposing punishment which has financial implication, lesser punishment of censure or warning would have met the ends of justice. It was vehemently argued that quantum of punishment is not commensurate with the charge.

In reply, it was submitted by learned counsel appearing for the opposite parties that the crux of allegation made in the charge is that the petitioner disobeyed the command of Shift-in-charge to blow whistle while performing duty. Such conduct on the part of a member of a disciplined force like CISF requires to be firmly dealt with. It was argued that imposition of minor punishment of withholding of one increment is not at all disproportionate to the nature of allegation made in the disciplinary proceeding.

5. While exercising writ jurisdiction, the High Court is not hearing an appeal against the decision of the Disciplinary Authority imposing punishment upon the delinquent employee. There is no scope to set aside the punishment altogether or impose some other penalty unless it is found that there has been a substantial non-compliance of the rules of procedure or a gross

violation of rules of natural justice which has caused prejudice to the employee and has resulted in miscarriage of justice or the punishment is shockingly disproportionate to the gravamen of the charge. In exercise of power of judicial review, High Court cannot trench upon the jurisdiction of the statutory authority to re-appreciate the evidence and to arrive at its own conclusion. When the conclusion of the authority is based on evidence, the Court is devoid of power to re-appreciate the evidence. Interference is permissible provided the Court comes to the conclusion that the finding of fact recorded by the authority is not based on facts or authority fails to take into consideration the relevant facts. In this context, decisions of the Hon'ble Supreme Court in ***Government of India and Another –vs.- George Philip*** : AIR 2007 SC 705 and of this Court in ***Jogeswar Bagh –vs.- Registrar (Admn.) Orissa High Court and three others*** : 2009 (1) OLR-483 may be referred to.

6. Admittedly, minor punishment has been imposed on the petitioner on the basis of allegation made by the Shift-in-charge and reply to the same filed by the petitioner. There was no enquiry in course of which oral evidence was taken. Considering the materials on record which included entry made in the General Diary by the Shift-in-charge and the petitioner's version contained in his reply, Disciplinary Authority held the charge to have been substantiated. Therefore, this is not a case in which it can be said that the order passed by the Disciplinary Authority is not supported by any evidence. The gravamen of charge against the petitioner is that he blatantly disobeyed the command of Shift-in-charge to blow whistle while performing duty. While doing so, the petitioner also misbehaved with his superior by making disrespectful remarks. In his reply the petitioner did not dispute to have refused to blow whistle. However, the petitioner denied to have misbehaved with the Shift-in-charge and explained that he refused to blow whistle on the ground that blowing of whistle would disturb the residents of TTPS and NTPS. Keeping in view the fact that the petitioner is a member of CISF which is supposed to be a disciplined organization, refusal to obey command certainly amounts to misconduct. However, in imposing the punishment the authority ought to have taken into account the petitioner's explanation also. Though such explanation does not absolve the petitioner of the charge of disobedience, it is relevant for considering the nature of punishment to be imposed on the petitioner. Moreover, the petitioner being an officer of the rank of Head Constable, punishment imposed on him resulting in pecuniary loss appears to be disproportionate with the nature of misconduct established against the petitioner in the background of the tenor of petitioner's explanation. Therefore, we are of the view that instead of directing withholding of one increment, the petitioner should be let off with the punishment of censure or warning.

7. For the reasons stated above, while holding that the finding recorded by the Disciplinary Authority to the effect that the petitioner is guilty of misconduct is immune from interference, we allow the writ application to the extent that the penalty imposed by the Disciplinary Authority and confirmed by the Appellate and the Revisional Authorities appears to be shockingly disproportionate. The Disciplinary Authority is directed to impose penalty on the petitioner in the light of the observations made above.

Writ petition allowed.

2010 (I) ILR-CUT- I96

A.S.NAIDU,J & B.N.MAHAPATRA,J.

LAXMIDHAR SETH -V- STATE OF OR
ISSA & ORS.*
OCTOBER 28,2009

ORISSA PENSION RULES, 1977 – RULE 13.

Compassionate allowance – Grant of compassion can not be insisted and has to be extended only on deserving persons on special consideration.

In this case the petitioner a Government employee was dismissed from service and applied for compassionate allowance – While facing departmental proceeding the petitioner trespassed into the office of the SDVO and tried to assault him with a stone – He was found guilty and had been convicted – Held, it is a fit case where compassionate allowance cannot be granted on special consideration.

(Para 13,14 & 15)

For Petitioner – M/s.N.N.Mohapatra & associates.
For Opp.Parties – Addl.Government Advocate.

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*W.P.(C) NO.2248 OF 2009. An application under Articles 226 & 227 of the Constitution of India.

A.S.NAIDU,J. Petitioner, as an applicant, filed O.A. No.2182(c)/2008, before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack, seeking quashing the order passed by the Commissioner-Cum-Secretary to Government Fisheries & ARD Department, rejecting the representation filed by the petitioner and issuance of a direction to the State of Orissa and others to extend the compassionate allowance in his favour.

2. The scenario of facts reveal that the petitioner was serving as an attendant attached to the Live-stock Aid Centre at Kanasara in Deogarh Sub-division of Sambalpur District. A disciplinary proceeding was initiated against him on the charges of disobedience of orders, negligence of duty, unauthorized absence from the station and certain acts of misbehaviour against V.A.S., Deogarh. Subsequently, it is alleged that the petitioner threatened to murder the SDVO, Deogarh and an additional charge was framed to that effect. During pendency of the Departmental Proceeding by order dtd.1.8.1994 he was placed under suspension. While matter stood thus, it is alleged that on 2.8.1984 the petitioner forcibly entered into the office of SDVO, Deogarh, being armed with a piece of stone and threatened to assault him by hurling abusive language.

3. On the basis of an F.I.R. lodged, G.R. Case No.201/1984 was initiated against the petitioner for commission of offences under Sections 448,294 and 506 IPC. After trial he was found guilty of commission of the offence under Sections 448 and 294 IPC and was sentenced to undergo imprisonment for six months and one month respectively. An appeal being

filed against the said order of conviction and sentence, conviction under Section 294 IPC was set aside, however the petitioner was convicted for the offence under Section 448 IPC but the punishment was modified to one of fine of Rs.500/-. The said order was assailed before this Court in Crl. Appeal No.446/1996. This Court dismissed the revision, but the fine was further reduced to Rs.100/-.

4. While matters stood thus, the petitioner approached this Court in OJC No.477/1986 with a prayer to quash the Disciplinary Enquiry. On promulgation of the Administrative Tribunal Act, the Writ Petition was transferred to the Orissa Administrative Tribunal and was registered as Transfer Application No.339/87. The Tribunal by a reasoned order dtd.29.6.1989 dismissed the Original Application and directed that the subsistence allowance admissible to the petitioner should be paid within three months and the disciplinary proceedings should be disposed of as expeditiously as possible.

5. In the Disciplinary Proceeding the charges were proved and the petitioner was dismissed from service mainly on the ground that he was convicted under Section 448 IPC. Being aggrieved, the petitioner filed O.A. No.1789(c)/1993 before the Orissa Administrative Tribunal. The said O.A. was disposed of by order dated 11.7.2001 giving liberty to the petitioner to file an application for grant of compassionate allowance under Rule 13 of the Orissa Pension Rules, 1977 (for short " Pension Rules") which was in force at the relevant time.

6. The petitioner thereafter filed a revision before the competent authority with a prayer to allow him compassionate allowance. The authorities after due consideration of the application, rejected the same. Being aggrieved the petitioner once again filed O.A. No.2182(c)/2008 before the Orissa Administrative Tribunal, Cuttack Bench, Cuttack. According to the petitioner the extreme punishment of dismissal imposed by the Disciplinary Proceeding is highly disproportionate to the offence alleged to have been committed by the petitioner and as such the authorities acted illegally and with material irregularity in not extending the benefit of compassionate allowance under Rule 13 of Pension Rules. The Tribunal after hearing learned counsel for the parties, by order dated 11.11.2008 dismissed the Original Application. Being aggrieved the petitioner has approached this Court.

7. Mr. Mohapatra, learned counsel appearing for the petitioner, relying upon Rule 13 of the Pension Rules, submitted that the order of termination being bad in law and highly disproportionate, the authorities should have at least extended the benefits flowing out of Rule 13 of the Pension Rules in his favour. The Tribunal, it is submitted, lost sight of the said fact and the order impugned thus according to Mr. Mohapatra cannot be sustained.

8. The aforesaid submissions are strongly repudiated by Mr. Patnaik, learned counsel appearing for the State. According to him the order of termination/dismissal of the petitioner has already attained finality as the same was not assailed before any authority. The only question which remained to be considered is as to whether the petitioner is entitled to receive compassionate allowance in consonance with Rule 13 of the Pension Rules. It is submitted that the authority has duly considered the said aspect and held that the petitioner is not entitled to receive compassionate allowance, consequently the order passed by the authority was confirmed. The said order being in consonance with law needs no interference.

9. Heard learned counsel for the parties at length and perused the materials available on record. Fact remains, the petitioner, who is a Government employee, was placed under suspension way back in 01.8.1984 and a disciplinary proceeding was initiated against him. During pendency of the disciplinary proceeding the petitioner got himself involved in a criminal case being G.R. Case No.201/1984. It is alleged that he trespassed into the office of SDVO and tried to assault him with a stone. The G.R. case ended in conviction. The appeal filed confirmed the conviction and this Court upheld the conviction in the criminal revision. Thus, the conviction of the petitioner in the criminal case has been confirmed and attained finality.

10. Thereafter, it appears that he was dismissed from service on the ground that he was convicted in a criminal proceeding. Conviction by a Court is no doubt a stigma, but then in all occasions it does not stand to reason that the extreme penalty of the dismissal would automatically follow.

11. Be that as it may, fact remains, the petitioner had assailed the order of dismissal before the Orissa Administrative Tribunal in O.A. No.1789(c)/1993. The said O.A. was, however, disposed of giving liberty to the petitioner to approach the authority for grant of compassionate allowance under Rule 13 of the Pension Rules. In other words the punishment of dismissal from service was not interfered, on the other hand, the same was confirmed. The said order was not assailed by the petitioner before the Court and also attained finality and is no more open to be examined by this Court at this stage.

12. In the present case, the petitioner only assails the order dated 11.11.2008 passed by the Tribunal in O.A. No.2182(c)/2008. Admittedly, in the said O.A. the petitioner prayed to quash the order passed by the Commissioner-Cum-Secretary to Government, Fisheries & ARD Department rejecting the representation filed by the petitioner to extend the benefit of compassionate allowance in consonance with Rule 13 of the Pension Rules. For the sake of brevity the said Rule is quoted herein below:

" No pension may be granted to a Government Servant dismissed or removed from Government Service as a disciplinary measure but to such a Government Servant compassionate allowance may be granted by Government when he is deserving of special consideration.

Provided that such allowance granted to any Government servant shall not exceed two-thirds of the pension and/or gratuity which would have been admissible to him if he had retired on medical certificate."

The Rule specifically provides that a Government employee dismissed or removed from service as a disciplinary measure, is not entitled to any pension. However, it further stipulates that a Government employee may be granted compassionate allowance by the Government when he deserves special consideration.

13. Admittedly, while facing a departmental proceeding the petitioner trespassed into the office of the SDVO, Deogarh and tried to assault the officer with a stone. He was found guilty and had been convicted. The conviction has been confirmed by this Court in a criminal revision. It appears from the order of the Tribunal that the petitioner was in Jail in the year 2008.

14. Under the aforesaid circumstances considering the conduct of the petitioner, the opposite party-Commissioner, came to the conclusion that it is a fit case where the compassionate allowance cannot be granted on special consideration. The Tribunal also declined to interfere with the said decision.

15. After going through the impugned order, we find no infirmity, even otherwise compassion cannot be insisted and has to be extended only on deserving persons on special consideration which are absent in the present case, and decline to interfere with the same.

The Writ Petition is accordingly dismissed.

2010 (I) ILR-CUT- 200

A.S.NAIDU, J & B.N.MAHAPATRA,J.

SRI GOURI SHANKAR MISHRA -V- ADMINISTRATOR,SHRI JAGANNATH TEMPLE, PURI & ANR.*

NOVEMBER 18,2009.

CONSTITUTION OF INDIA, 1950 – ART.311(2).

Disciplinary enquiry – Disciplinary authority while disagreeing with the findings of the Inquiry Officer holding the delinquent guilty of charges has to issue prior notice to the delinquent officer to represent, before it records its findings.

In the present case the disciplinary authority had taken the final decision without giving any opportunity of hearing to the petitioner at the stage at which it proposed to differ with the findings of the Inquiry Officer, as well as the proposed punishment – Held, impugned order quashed – Matter remitted to the Administrator of Sri Jagannath Temple for fresh disposal as per law. (Para 7)

Case laws Referred to:-

1.AIR 1999 SC 3734 : (Yoginath D.Bagde -V-State of Maharasthra & Anr.)
2.AIR 1998 SC 2713 : (Punjab National Bank & Ors.-V-Kunj Behari Misra).

For Petitioner – M/s.Ashok Mohapatra, B.P.Rath.

For Opp.Parties – M/s.J.N.Rath & Associates (O.P.1).

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*ORIGINAL JURISDICTION CASE NO.13923 of 1999. In the matter of an application under Articles 226 & 227 of the Constitution of India.

A.S.NAIDU,J. The petitioner was engaged as a 'Barakandaj' in the establishment of Sri Jagannath Temple, Puri. While discharging his duties, certain charges were levelled and on being satisfied that a prima facie case is made out, disciplinary proceeding was initiated against the petitioner. In the Departmental Proceeding, the Enquiry Officer after following the principles of natural justice and equity held that the charges levelled against the petitioner have been proved. Consequently, the Enquiry Officer suggested punishment of stoppage of one increment with cumulative effect and also issuance of warning. The Disciplinary Authority, however, after going through the enquiry report and considering the punishment suggested, did not agree with the same. According to the disciplinary authority, latches are very much apparent as far as the petitioner is concerned, inasmuch as he has left one of the entrances (Paschima Dwara) of the temple unguarded. He had dereliated his duties and proved himself unworthy for serving as Barakandaj. In the past also his conduct was very discouraging and he had not improved his behaviour. On the basis of such observations, it was held that the petitioner should be removed from service. Consequently, by order dated 3.6.1994, the petitioner was removed from service. Being aggrieved, it appears, the petitioner preferred an appeal before the Chairman and in the meanwhile the appeal has also been

dismissed. However, the order of dismissal has not been annexed to this writ application.

2. In course of hearing, learned counsel for the petitioner submitted that the disciplinary authority did not properly appreciate the findings arrived at by the Enquiry Officer and the punishment imposed was disproportionate to the charges levelled.

3. These submissions, however, are strongly repudiated by Mr.Rath, learned counsel appearing for the Temple Administration. According to Mr.Rath, the petitioner proved himself to be unworthy and earlier also number of disciplinary proceedings were initiated against him and he was left out with warning and/or imposition of minor punishment. Consequently, the disciplinary authority thought it just and proper to impose the punishment of removal from service as the petitioner has not improved by efflux of time.

4. We have heard learned counsel for the parties. We have also perused the charge-sheet and other materials. This is a case where the disciplinary authority has disagreed with the finding of the Inquiry Officer.

5. In the case of **Yoginath D.Bagde v. State of Maharashtra and another**, AIR 1999 SC 3734, the Supreme Court held that the disciplinary authority while disagreeing with the findings of the Inquiry Officer holding the delinquent guilty of charges has to issue prior notice to the delinquent officer.

6. In the case of **Punjab National Bank and others v. Kunj Behari Misra**, AIR 1998 SC 2713 it has also been observed by the Supreme Court that whenever the disciplinary authority disagrees with the inquiry authority on any article of charge then before it records its own findings on such charge, it must record its tentative reasons for such disagreement and give to the delinquent officer an opportunity to represent before it records its findings.

7. In the instant case, we have scrutinized the reasons of the disciplinary authority and found that it had taken the final decision without giving any opportunity of hearing to the petitioner at the stage at which it proposed to differ with the findings of the Inquiry Officer as well as the proposed punishment. Such conclusions having been arrived at behind the back of the petitioner, the same are sufficient to vitiate the findings recorded by the Disciplinary Authority. Consequently, we set aside the order dated 3.6.1994 (Annexure-3) as well as Annexure-4 and remit the matter to the Administrator of Sri Jagannath Temple with a direction to issue notice to the petitioner and thereafter proceed strictly in accordance with law. It is made clear that we have not delved into the merits of the case and it would be open to the disciplinary authority to pass such orders as deemed just and proper.

8. The writ application is accordingly disposed of.

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2010 (I) ILR-CUT- 202

PRADIP MOHANTY,J & B.K.PATEL,J.

DEEPAK KUMAR DASH -V- STATE OF ORISSA.*

NOVEMBER 12,2009.

EVIDENCE ACT, 1872 (ACT NO.1 OF 1872) – SEC.27

Leading to discovery – Not supported by any independent witness – No exact information has also been adduced through evidence that the accused led the police to the place of concealment and gave recovery of the weapon of offence – The weapon of offence i.e. "Katari" was neither produced nor proved – Held, information given regarding leading to discovery should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. (Para 7)

For Appellant – M/s.S.R.Mulia, B.R.Dalai , D.Dash & S.Mohanty.
For Respondent – Addl.Government Advocate.

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*JAIL CRIMINAL APPEAL NO. 179 OF 1999. From the judgment dated 27.04.1999 passed by Sri N.Prusty, Ist Additional Sessions Judge,Cuttack in Sessions Trial No.220 of 1997.

PRADIP MOHANTY,J. This appeal is directed against the judgment and order dated 27.4.1999 passed by the learned 1st Additional Sessions Judge, Cuttack in Sessions Trial No.220 of 1997 convicting the appellant under section 302 I.P.C. and sentencing him to undergo imprisonment for life and to pay fine of Rs.25,000/- in default to undergo R.I. for two years.

2. The case of the prosecution is that on 17.10.1996 at about 3 P.M., the father of the informant (W.P.3) had been to his land to put "GARVANA STICK" , but he did not return. The informant went in search of his father and found him lying in the maize field having injuries on his head and neck. He lodged F.I.R. before the Kissannagar Police Station suspecting the present appellant and his parents to be the assailants of his father. After investigation charge sheet was filed against the present appellant and two others (parents of the appellant).

3. The plea of the present appellant is complete denial of the allegations.

4. In order to substantiate the charge, prosecution examined as many as seven witnesses including the doctor and the I.O. and exhibited 23 documents. The defence examined one witness.

5. The learned Additional Sessions Judge having regard to the facts of the case, the evidence on record, leading to recovery under section 27 of the Evidence Act and corroboration made by D.W.1 in respect of recovery of weapons of offence came to hold that the prosecution has been able to complete the chain of circumstance in order to bring home the charge against the present appellant and convicted and sentenced him as stated

earlier. He, however, acquitted the other two accused persons with the finding that the prosecution has miserably failed to prove the charge against them.

6. Mr. Mulia, learned counsel for the appellant, assails the impugned judgment on the following grounds:

(i) admittedly there is no eye-witness to the occurrence and the case solely rest on circumstantial evidence;

(ii) the prosecution has not been able to complete the chain of circumstances;

(iii) there is no independent corroboration to the story relating to leading to recovery of the weapon of offence;

(iv) the so-called confessional statement can not be accepted as it does not contain signature of the accused or the witnesses;

(v) the prosecution has not produced nor proved the material object before the trial court, and

(vi) P.W.4, who is said to be a witness to the seizure of weapon of offence, has not supported the same.

7. Mr.Nayak, learned Additional Government advocate in response submits that the prosecution has been able to complete the chain of circumstances. P.Ws.2, 3 and 5 have clearly established the motive behind the murder. Ten to fifteen days prior to the occurrence, the appellant and other accused persons had assaulted the deceased. The weapon of offence, i.e., Katari, was recovered at the instance of the appellant in presence of the witnesses. The witnesses as well as the appellant have put their signature on the seizure list (Ext.3). The appellant led the Investigating Officer to the place of concealment and gave recovery of the Katari. P.W.6, the doctor, in his examination-in-chief has opined that the cut wounds as described in the post-mortem report can be caused by such a weapon, e.i., a Katari. Therefore, no fault can be found in the impugned judgment convicting the appellant under section 302 I.P.C.

8. Perused the deposition of witnesses and the exhibits. P.W.1 is said to be an eye-witness but he has not supported the prosecution case. Although the prosecution declared him hostile and put leading questions, nothing has been elicited from him to support its case. P.W.2 is the wife of the deceased Sarat Chandra Das. She stated in her evidence that on the date of occurrence her husband had been to their land to fix “GARVANA STICK” as per the tradition but till 5 P.M. he did not return. Her son sent in search of his father and found him lying dead in the land. She has also stated that the appellant was absorbed in a temporary Government service at Kendrapara due to the arrangement made by her husband. Subsequently, after the appellant lost his temporary service, there was ill-feeling between the appellant and her husband. In her cross-examination P.W.2 stated that

since her husband filed a case for restitution of conjugal rights, she filed a maintenance case against her husband. She also admitted that she had not informed the police about entry of the appellant and one Khirod into her house being armed with Tenta. She also admitted that there was ill-feeling between them. P.W.3, the informant, is the son of the deceased. He has corroborated the statement of her mother. It is further stated that he lodged F.I.R. Ext.2 before Kissannagar Police Station. In cross-examination he admitted that 15 days before the occurrence the appellant entered into his house with Tenta but he did not inform this fact before the police. P.W.4 is the witness to the seizure to recovery of weapon of offence, i.e., Katari. He has not supported the prosecution case. He was declared hostile and thereafter leading questions were put to him. He admitted his signature in the seizure list but in cross-examination he specifically stated that on 24.10.1996, i.e., the date proceding to the date of seizure, being shown by the police he traced the knife in the schools field near the damaged latrine and seizure list was prepared and he put his signature. With regard to leading to recovery of weapon of offence by the appellant under section 27 of the Evidence Act he has not stated anything in his statement. P.W.5 is another son of the deceased. P.W.6 is the doctor who conducted autopsy over the dead body of the deceased and found the following injuries.

(i) Cut wound of size 13 cm. long with a gap of 12 cm. on extended neck and involves up to a depth of pharynx, where the would has cut through and through the skin underline muscles and vessels on front and left side of neck,the 4^{th} cervical vertebral body along with spinal cord and situated by encircling the front and left side of the neck;

(ii) Cut wound 3 cm. x 1 cm. x superficial muscle deep situated in front of right shoulder vertically 3.5 cm. outer and below the lateral end of right clavicle.

(iii) Cut would 8 cm. length cutting 4 cm. in depth with a gap of 1 cm. situated transversely and little obliquely in the postero lateral aspect of right fore arm 16.5 cm. above the lower end of radius.

(iv) Pressure abrasion of size 4 cm. x 1 cm. with black coloured skin over it situated on the ulnar boarder of right fore arm 2 cm. behind the outer end of injury no.(iii).

(v) Cut would 4 cm. x 0.75 cm. x bone deep situated in an antero posterior direction 4 cm. above the mid point of left eye brow little obliquely.

(vi) Cut wound 8 cm. x 1 cm. x bone deep situated over the right parietal region of the head at the level of partietal eminence 5 cm. behind the injury no.(vii).

(vii) Cut wound 10 cm. x 1.5 cm. x bone deep situated on right fronto parietal region of the head8 cm. above the root of right ear.

The doctor opined that all the injuries were ante-mortem in nature and all the injures, when considered together were fatal in ordinary course of nature. The external injuries would have been caused by any heavy or moderately heavy cutting weapon. Nothing has been elicited from his cross-examination by defence. It is specifically stated by the doctor that death of deceased occurred due to combined effect of haemorrhage, shock and complete transaction of spinal cord.

7. There is no dispute that the deceased Sarat Chandra Dash was lying with cut injuries on the head and neck. Information given regarding leading to discovery should be recorded and proved and if not so recorded, the exact information must be adduced through evidence. In the instant case the information given by the accused has not been recorded nor proved and only the seizure list has been proved. No independent corroboration is there to support the prosecution case. Ext.16, the disclosure statement, on which much reliance has been placed by the trial court, does not contain the signature of the witness or the accused. The station diary entry has not been proved by the investigating officer. Though the conviction has been based on circumstantial evidence, the chain of circumstances is not complete. Only evidence available against the accused is that there was ill-feeling between the deceased and the present appellant. The claim of the prosecution regarding leading to recovery under section 27 of the Evidence Act has not been supported by any independent witness. No exact information has also been adduced through evidence that the accused led the police to the place of concealment and gave recovery of the weapon of offence. The weapon of offence, i.e., Katari, was not produced and also not proved by the prosecution. In the circumstances, this Court opines that no conviction can be based on the evidence adduced/produced by the prosecution.

9. In the result, this appeal is allowed and the order of conviction and sentence passed against the appellant is set aside.

Appeal allowed.

2010 (I) ILR-CUT- 206

M.M.DAS,J.

KUMARI BEHERA -V- STATE OF ORISSA & ORS.*

OCTOBER 14,2009.

PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT,2005 (ACT NO.43 OF 2005) – SEC.27

Domestic violence – Protection order – Court of the Judicial Magistrate of the First Class or the Metropolitan Magistrate, as the case may be, shall be the competent Court to grant protection order and other orders and try offences under the said Act – Held, learned J.M.F.C.,Pattamundai has failed to exercise his jurisdiction by rejecting the complaint petition – He is directed to proceed with the said complaint petition as per the procedure laid down in the Act,2005.

(Para 7 & 10)

For Petitioner- M/s.SangramKu.Sahoo,G.Sahoo, M.K.Mallick, D.P.Pattnaik & J.R.Sahoo.

For Opp.Parties - Addl.Govt.Advocate.

*CRLMC. NO. 1234 OF 2007. In the matter of an application under Section 482 Cr.P.C.

M.M.DAS,J. "Amittere Legem Terrce" (To be put out of the protection of the law) is the grievance of the petitioner in this application under section 482, Cr.P.C.

2. The petitioner is the daughter-in-law of the opposite party no.2 married to one of the sons of the opposite party no.2, namely, Ramesh Chandra Behera, who is stated to be born through the first wife of the opposite party no.2. The opposite party nos.3 and 4 are the younger brothers of the husband of the petitioner being the sons of opposite party no.2 through his second wife.

3. Alleging that the petitioner and her children were tortured physically and mentally by the opposite parties and her ornaments were forcibly removed from her by them and she was thrown out of her matrimonial house on 06.11.2006 along with her three minor children in the absence of her house, she filed an application before the learned J.M.F.C., Pattamundai under section 12 of the Protection of Women from Domestic Violence Act,2005 (hereinafter referred to as 'the Act 2005). In the said complaint petition numbered as I.C.C. Case No.152 of 2006, the petitioner sought for the following reliefs:

> "i) Protection order U/s.18
>
> Prohibiting acts of Domestic Violence by granting an injunction against Respondents for repeating any such acts and prohibiting Respondents for alienations of any of assets by the Respondents and pay compensation and also the amount as aforesaid towards

loss of earnings and ornaments of applicant.

ii) Residence order U/s. 19

An order restraining Respondents from dispossessing or throwing applicant out from her shared house hold and alienating or disposing or encumbering the said shared house of applicant and an order directing Respondents to put applicant into possession in respect of her said matrimonial shared house or secured some lebel of ulternate accommodation or pay rest for same.

iii) Monetary reliefs under section 20

The respondents be directed to pay applicant following amount :

Loss of earnings, amount claimed Rs.o5,000/-
Loss of Ornaments Rs.20,000/-
Compensation towards physical and
Mental torture Rs.15,000/-
Total amount claimed Rs.40,000/-
(Rupees forty thousand only)

iv) Monetary reliefs under Section 20

As aforesaid

v) Custody order U/s.21

Not applicable.

vi) Compensation Order U/s.22

As foresaid

vii) Any other order please specify

That, the applicant along with her minor children may please be put into their possession in respect of their matrimonial shared house at the instance of the O.I.C., Pattamundai P.S. after obtaining undertaking from Respondents for said custody of applicant and her minor children located over Plot No.243 of Village-Tatana, P.S.-Pattamundai, Dist-Kendrapara."

4. The learned Magistrate by his order dated 20.01.2007 perusing the complain petition and observing that the complainant has prayed to pass orders under sections 15/19/20/21 of the 2005 Act, came to a conclusion that since the area of the said court comes under the judgeship of Cuttack and there is existence of Family Court in the judgeship, in view of sections 7 and 8 of the Family Courts Act, 1984 and under section 26 of Act 2005 returned the complaint petition to the complainant to file the same in the appropriate court of law.

5. The petitioner finding no other alternative approached the Judge, Family Court, Cuttack in Criminal Proceeding No.148 of 2007. By order dated 01.05.07, the learned Judge, Family Court Cuttack referring to section 2(1) of the Act 2005 and section 7(2) of the Family Courts Act, 1984 (hereinafter referred to as 'the Act 1984) came to a conclusion that as no

relief for maintenance is sought for by the petitioner according to section 20(1) (d) and section 20(3) of the Act, 1984, the Family Court has no jurisdiction to entertain the proceeding.

6. Being thus placed between the horns of dilemma, the petitioner has approached this Court in the present case. The only question to be addressed by this Court is with regard to, where the petition filed by the petitioner would be maintainable? The various sections of the Act 2005, which are relevant for the purpose of deciding the case, are quoted hereunder:

> "2. **Definitions.**
>
> (a) to (h) xxx xxx xxx
>
> (i) "Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973 (2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place,"
>
> " **26. Relief in other suits and legal proceedings** – (1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.
>
> (2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.
>
> (3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief"
>
> **"27. Jurisdiction** – (1) The court of Judicial magistrate of the first class or the Metropolitan Magistrate, as the case may be, within the local limits of which-
>
> (a) the person aggrieved permanently or temporarily resides or carries on business or is employed ; or
>
> (b) the respondent resides or carries on business or is employed; or
>
> (c) the cause of action has arisen,
>
> shall be the competent court to grant a protection order and other orders under this Act and to try offences under this Act.
>
> (2) Any order made this Act shall be enforceable throughout India."

7. A bare reading of section 27 of the Act clearly shows that the Court of Judicial Magistrate of the First Class or the Metropolitan Magistrate, as the case may be, shall be the competent court to grant protection order and other orders and to try offences under the said Act. Section 2(i) defines "Magistrate" whereunder Judicial Magistrate of the First Class is also a Magistrate for the purpose of the Act. Section 26(1) of the Act clearly envisages that if any legal proceeding is pending before a Civil Court, the Family Court, or a Criminal Court, such court can grant any relief available under sections 18, 19, 20, 21 and 22, if such reliefs are sought for in the pending proceeding. Section 26(2) similarly provides that any relief under Sub-section (1) may be sought in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

8. The intention of Legislature is, therefore, clear that teliefs under sections 18 to 22 of Act 2005 can also be granted in a pending proceeding before a Family Court but, however, for filing an independent proceeding seeking relief's under the aforesaid sections the aggrieved party has to approach the concerned Magistrate having jurisdiction as per the provisions of section 27 of the Act.

9. In view of the above analysis, the learned Judge, Family Court, Cuttack was right in passing the order dated 01.05.07 in Criminal Proceeding No.148 of 2007 holding that the proceeding is not maintainable before him. However, the order passed by the learned J.M.F.C. in I.C.C. Case No.152 of 2006 is found to be palpably erroneous and the learned Magistrate has failed to exercise jurisdiction vested in him under Act. 2005.

10. In the result, therefore, the order dated 20.01.2007 passed by the learned J.M.F.C., Pattamundai in I.C.C. Case No.152 of 2006 is quashed and the learned J.M.F.C. is directed to proceed with the said complaint petition in accordance with the procedures laid down in the Act 2005. Since this matter is of the year 2006, the petitioner is directed to appear before the learned J.M.F.C., Pattamundai and produce a certified copy of this order before him within a period of three weeks from today. The learned Magistrate thereafter shall proceed with the matter so as to conclude the case expeditiously.

The CRLMC is accordingly allowed.

2010 (I) ILR-CUT- 210

M.M.DAS,J.

G. B. OF EVENING COLLEGE,ANGUL -V- STATE OF ORISSA & ORS.*

NOVEMBER 24,2009.

Education – Cancellation of result – Examination Committee found the result of the College as abnormally high – Re-examination of the answer scripts by subject experts – Subject Experts found examinations in the said centre not conducted as per rule and there was mass mal-practice in the subjects in question – This Court has perused the report of the examination Committee – Except accepting the report submitted by the subject experts there is nothing to show that the Examination Committee has applied its mind before taking the decision to cancel the result of the students – Held, decision of the Examination Committee quashed.

(Para 10)

Case laws Referred to:-

1.AIR 2007 SC 1363 : (U.O.I. & Ors.-V- Jai Prakash Singh & anr.).
2.2001 (I) OLR 398 : (Board of Secondary Education, Orissa,Cuttack -V- Gayatri Hota & ors.)
3.2007(I) OLR 161 : (Kumari Babita Jena & ors.-V-Council of Higher Secondary Education, Orissa & ors.).
4.AIR 1969 SC 198 : (Suresh Koshy George -V- University of Kerala & ors.).
5.1988 (II) OLR 451 : (Prashanta Kumar Chakara -V-Council of Higher Secondary Education, Orissa).

For Petitioner – Budhadev Routray.
For Opp.Parties – S. Jena.

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*W.P.(C) NO.3897 OF 2008. In the matter of an application under Articles 226 & 227 of the Constitution of India.

Heard Mr. Routray, learned counsel for the petitioner and Mr. Jena, learned counsel for the opp. parties 2 and 3.

2. The petitioner is the Principal of Angul Evening College, Angul. 49 regular students of the petitioner's college appeared at the +2 Annual Higher Secondary Examination, 2007

3. It is the case of the petitioner that there were no allegations whatsoever as against any students, when they appeared in the said examination, from any body in the examination centre. Rather, the examination was conducted strictly in accordance with the rules prescribed by the Council. Though the result of the said examination was published on 8.6.2007, but the name of the petitioner's college did not find place and the result of the students of the said college was not declared. Finding thus, they moved before the Council to know the reason for not declaring the result.

4. After about a month, a notification was issued on 4.7.2007 notifying that the examination in respect of Economics Papers-I and II, Political Science Papers-I and II and Logic Papers-I and II of the said examination has been cancelled in respect of the centre from which the students appeared basing on the report submitted by the Subject Experts. The petitioner has alleged the inaction of the opp. parties as arbitrary and the decision taken is without resorting to the procedure as prescribed and without affording opportunity either to the institution or to the students of the institution. Being aggrieved by such action on the part of the opp. parties, the petitioner has approached this Court in the present writ petition for appropriate relief.

5. Mr. Routray, learned counsel for the petitioner submits that even accepting that the Subject Experts while reviewing the answer papers,which were already evaluated, submitted a report, but on the basis of such report, the Council is not empowered to take such a drastic action against large number of students. Such action has been taken hurriedly without due consideration of all the materials. Cancelling the result and awarding '0' marks to the students is a stigma , which cannot be done ex parte without hearing the affected party. No allegation whatsoever has been made either by the Invigilator/Centre Superintendent/Supervisors or the Flying Squad with regard to the students adopting mal-practice at the time of appearing in the examination.

6. A counter affidavit has been filed on behalf of the opp. parties, inter alia, taking a stand that as the Examination Committee found the result of the college to be abnormally high, out of suspicion, the Committee thought it proper to re-examine the answer scripts of the aforesaid papers by Subject Experts. The Subject Experts re-examined the answer scripts of the aforesaid papers and submitted their report s before the Examination Committee. As it was found from the said reports that the examinations in the said centre were not conducted as per rule and there was mass mal-practice in the aforesaid subjects, the Examination Committee decided to cancel the results of the aforesaid papers.

7. Mr. Routray, learned counsel relying upon the decision of the Supreme Court in the case of ***U.O.I. & others v. Jai Prakash Singh and another***, AIR 2007 S.C. 1363 and the decisions of this Court in the case ***Board of Secondary Education, Orissa, Cuttack v. Gayatri Hota and others,*** 2001 (I) OLR 398 and ***Kumari Babita Jena and others v. Council of Higher Secondary Education, Orissa and others,*** 2007(I) OLR 161 submitted that law has been fairly settled in the aforesaid decisions that only because some of the answer scripts are tallying and/or similar and/or identical with some other answers, that too, in respect of the

students, who were appearing in the examination in different halls, a conclusive interference cannot be drawn to the effect that they were involved in mass mal-practice. Law is also settled that before arriving at the conclusion that the examinees were involved in commission of mass mal-practice during the examination, the requirements of natural justice have to be followed. The above principles have been approved by the apex Court in the case of ***Suresh Koshy George v. University of Kerala and others,*** AIR 1969 SC 198.

8. This Court in the case of ***Prashanta Kumar Chakara v. Council of Higher Secondary Education, Orissa,*** 1988 (II) OLR 451 observed that the authorities cannot utilize materials which had not been put to the petitioner and that the principle of natural justice have to be sacrosanctly followed in the case of cancellation of result on the ground of mass mal mal-practice. In the case of Kumari Babita Jena and others (supra), a Division Bench of this Court, being posed with a similar facts, held that the stand taken by the Council that the result was cancelled due to infringement of the examination rules or because of mass mal-practice, since the answer scripts indicated identical answers, cannot be accepted. Identical answer may be found for very many reason, but for the inference that it was the result of mass mal-practice, something has to be proved.

9. Learned counsel for the C.H.S.E. relied upon the judgment dated 11.8.1992 of this Court passed in O.J.C. No. 4316 of 1991 (***Radhaballav Baral and others v. Council of Higher Secondary Education and another)*** and the judgment dated 2.8.2002 passed in O.J.C. No. 6438 of 2000, ***(Smt. Pravamayee Nayak and others v. Council of Higher Secondary Education, represented through its Chairman, Pragnyapitha, Bhubaneswar and others***), wherein this Court upheld the stand taken by the Council. The facts of the said cases, however, are distinguishable from the facts of the present case, as the facts of the case in Radhaballav Baral and others (supra) disclosed that the answers to essays were identical and the grammatical mistakes were similar. In the case of Smt. Pravamayee Nayak and others (supra), the report was submitted while evaluating the answer scripts immediately which was placed before the Examination Committee and the said Examination Committee, observed that it is a clear case of mass mal-practice. The Court, on finding that it is not only the identicality of the answer of the petitioners therein, but also the incorrect answers being identical, upheld the decision of the Council. However, it was observed that what could be considered mass copying cannot be laid down with mathematical precision and it has to be decided on the facts and circumstances of each case as to whether there has been mass copying at a particular examination centre. Since in the instant case,

the Court had the occasion to peruse the report of the Examination Committee, which was produced, and found that except accepting the reports submitted the Subject Experts, there is nothing to show that the Examination Committee has applied its mind before taking the decision to cancel the result of the students of the petitioner-college in respect of the papers mentioned above, this Court is of the view that applying the settled position of law, as discussed above, the decision of the Examination Committee cannot be sustained. Accordingly, the decision for cancelling the results of the students of the petitioner-college in the aforesaid subjects is quashed and the Council of Higher Secondary Education is directed to declare the result of the students of the petitioner-college by awarding them the marks as has been awarded by the valuers of the respective answer scripts. Such result shall be declared within a period of three months from the date of production of a certified copy of this order before the Controller of Examinations, C.H.S.E., Orissa by the petitioner and the mark-sheets and certificates of the students of the petitioner-college shall be sent to the petitioner-college within a period of three weeks thereafter for being handed over to the said students.

The writ petition is accordingly allowed.

2010 (I) ILR-CUT- 214

M.M.DAS,J.

DR.NILAMANI MOHANTY -V- STATE OF ORISSA & ORS.*

OCTOBER 6,2009.

CONSTITUTION OF INDIA, 1950 – ART.14.

Education – Admission – Cut-off date – Admission to Post Graduate Supper Speciality Courses – Petitioner secured rank No.2 in the merit list – He was not given admission as he did not acquire eligible qualification by the cut-off date – Hence, this writ petition.

Artificial classification between doctors acquired minimum qualification prior to 31.3.2009 and after that date but before the last date fixed for submission of forms – Cut-off date has no reasonable nexus with the object to be achieved i.e. to select "best Candidates"and to produce "quality doctors" – Action is arbitrary, discriminatory and violative of Art.14 of the Constitution – Held, petitioner be given admission to the seat kept vacant pursuant to the interim order passed by this Court earlier.

(Para 12 & 13)

Case laws Referred to :-

1.AIR 1975 SC 1436 : (Jaila Singh & anr.-V-State of Rajasthan & ors.).
2.AIR 1983 SC 130 : (D.S.Nakara & ors.-V-Union of India).
3.AIR 1985 SC 1367 : (Dr.(Mrs.) Sushama & Ors.-V-State of Rajasthan & Ors.).
4.1987 (2)SCC 453 : (U.P.M.T.S.N.A.Samiti,Varanasi -V-State U.P.& Ors.).
5,.AIR 1990 SC 1782 :(Krishena Kumar -V-Union of India & anr.).
6.AIR 1991 SC 1743 : (State of Rajashthan -V-Rajasthan Pensioner Samaj).
7.AIR 1992 SC 767 : (All India Reserve Bank Retired Officers Association- - V-Union of India & Ors.).
8.(1993(2 SCC 174 : (T.S.Thiruvengadam -V-Secretary to the Govt. of India).
9.(1996) 7 SCC 564 : (M.C.Dhingra -V- Union of India & Ors.).
10.(1996) 10 SCC 563 :University Grants Commission -V-Sadhana Chaudhary & Ors.).
11.AIR 1997 SC 782 : (State of Rajasthan & Anr.-V-Anrit Lal Gandhi & Ors.).
12.AIR 1999 SC 2526 : (Union of India & Ors.-V-M.V.Valliappa).
13.(1997)4 SCC 18 : (Ashok Kumar Sharma -V-Chandra Sekhar).
14.(1990)2 SCC 669 : (Andhra Pradesh Public Service Commission -V-B.Sharat Chandra).
15,.(1993)2 SCC 429 : (M.V. Nair 4(Dr.) -V-Union of India).
16.(2002)2 SCC 124 : (Jasbir Rani & Ors.-V-State of Punjab & Ors.)
17.(2002)2 SCC 179 : (State of West Bengal & Anr.-V-West Bengal Govt. Pensioners Association & Ors.).

DR. NILAMANI MOHANTY -V- STATE

For Petitioner –Budhadev Routray.
For Opp.Parties –R.C.Mohanty

*W.P.(C) NO.9604 OF 2009. An application under Articles 226 & 227 of the Constitution of India.

Heard learned counsel for the petitioner, learned counsel for the State representing opp. parties 1 to 3, Mr. G.A.R. Dora, learned counsel for the opp. party nos. 4 and 6 and Mr. R.C. Mohanty, learned counsel appearing for the Medical Council of India.

2. The petitioner in this writ petition has called in questions the legality of fixing the cut-off date as 31.3.2009 in Clause-1.3 of the prospectus for admission to Post Graduate Super Speciality Courses at S.C.B. Medical College, Cuttack. He has also prayed for issuance of a writ of mandamus directing the opp. parties 1 to 3 to give admission to the petitioner as against one of the four seats in the said course. Pursuant to the advertisement, the petitioner made an application to appear in the entrance test which was scheduled to be held on 26.6.2009. Such application was made by the petitioner on 21.6.2009. The last date for acceptance of the application was fixed as 22.6.2009. A merit list was published in which the petitioner was placed in serial no.2 and was called to attend the counselling which was held on 4.7.2009. It is alleged that during the counselling, the petitioner's name was not called and on enquiry he could not ascertain the reason therefor. Being aggrieved by the action of the opp. party no. 3 in not giving him admission to one of the seats in Super Speciality Course, the petitioner has preferred the present writ petition.

3. Learned counsel for the petitioner submits that the petitioner was not given admission even though he secured rank no.2 in the merit list on the ground that he did not acquire the eligible qualification by the cut-off date as fixed in Clause–1.3 of the prospectus. He further submits that though it is given out in the prospectus that the applications from ineligible candidates will be rejected summarily, the petitioner's application form having been accepted and he being issued with the admit card, permitted to appear in the entrance examination, given rank no.2 in the merit list and called for counselling, the opp. parties 1 to 3 are estopped from not allowing the petitioner to take admission to one of the four seats on the ground that the petitioner is not eligible as per the eligible criteria as has been stated in the counter affidavit. On 3.9.2009, as it was submitted before this Court that the opp. party no. 4 has vacated the seat and the said seat is lying vacant, to which the opp. party no. 4 was admitted, this Court passed an interim order directing that the said seat shall not be filled up, which is still lying vacant.

4. Learned counsel for the State submits that the cut-off date, i.e., 31.3.2009 as fixed in Clause-1.3 of the prospectus is an old practice which was being done in all previous years and in support of such contention, he

produced the prospectus of the previous years where also 31st March was fixed as the cut-off date.

5. Mr. R.C. Mohanty, learned counsel for the Medical Council of India submits that, time schedule for giving admission to such Super Speciality Course as fixed by the Apex Court as well as the M.C.I. is over which is 30.9.2009 and, therefore, the said date fixed being over, any seat remaining vacant or unfilled out of the sanctioned seats, cannot be carried forward for the next academic year. Clause-1.3 of the prospectus is as follows:-

"Clause-1.3 - **Commencement of session & Duration of Course:-**

The academic session will commence from 01.08.2009 for the year 2009 unless otherwise notified. The duration of the course will be for an uninterrupted period of three years. The candidates are required to fulfill the eligibility requirement by 31.03.2009".

The eligibility criteria have been prescribed in Clause-8 of the prospectus, which is as follows:-

"Clause -8 : **ELIGIBILITY CRITERIA;**

8.1. The candidate must be a permanent resident of Orissa and he/she is required to furnish a certificate of "Permanent resident of Orissa" in the enclosed proforma (Vide Appendix-III) from a revenue officer not below the rank of a Tahasildar of the area concerned."

6. Mr. G.A.R. Dora, learned counsel for the opp. parties 4 and 6 submits that since opp. party no. 4 has vacated the seat, the rank of opp. party no.6, who held rank no.5 should be considered as rank no. 4 and, therefore, his admission cannot be disturbed.

7. The basic question to be determined in this case is as to whether the fixation of the cut-off date in Clause–1.3 as on 31.3.2009 is arbitrary, unreasonable and discriminatory ?.

When a cut-off date is fixed by the concerned authority, the Court is required to keep in mind that such a date must have been fixed by the authority after considering various aspects of the case and, therefore, there is very limited scope of judicial interference in such matters. This issue has been examined and considered by the Supreme Court time and again in a large number of cases, some of which are ***Jaila Singh & another v. State of Rajasthan and others***, AIR 1975 SC 1436, ***D.S. Nakara & others v. Union of India,*** AIR 1983 SC 130, ***Dr. (Mrs.) Sushma Sharma and others v. State of Rajasthan and others***, AIR 1985 SC 1367, ***U.P.M.T.S.N.A. Samiti, Varanasi v. State of Uttar Pradesh and others,*** 1987 (2) SCC 453, ***Krishena Kumar v. Union of India and another,*** AIR 1990 SC 1782, ***State***

of Rajasthan v. Rajasthan Pensioner Samaj, AIR 1991 SC 1743, ***All India Reserve Bank Retired Officers Association v. Union of India and others,*** AIR 1992 SC 767, ***T.S. Thiruvengadam v. Secretary to the Government of India,*** (1993) 2 SCC 174, ***Union of India and others v. Sudhir Kumar Jaiswal,*** AIR 1994 SC 2750, ***M.C. Dhingra v. Union of India and others,*** (1996) 7 SCC 564, ***University Grants Commission v. Sadhana Chaudhary and others***, (1996) 10 SCC 536 and ***State of Rajasthan and another v. Amrit Lal Gandhi and others,*** AIR 1997 SC 782 and many others.

8. It is a settled proposition of law that a cut-off date can be introduced, but it is not permissible to introduce such a date in an artificial manner resulting in discrimination between similarly situated persons. A cut-off date may be introduced by creating a fiction, but before fixing such cut-off date, the consequences are required to be examined thoroughly and the date so fixed must have some nexus to the object sought to be achieved and should not result in making an artificial classification between similarly situated persons. If the choice of fixing a particular date is shown to be wholly arbitrary and introduces discrimination, which violates the mandate of Article 14 of the Constitution, such a cut-off date can be struck down for the reason that a purpose of choice unrelated to the object sought to be achieved cannot be accepted as valid. In a Constitution Bench of the Supreme Court in ***Union of India and others v. M.V. Valliappan,*** AIR 1999 SC 2526, it has been held that a cut-off date cannot be held to be invalid unless it is shown to be capricious or whimsical and it cannot be held to be so merely in absence of any particular reason for choosing the same. The Court observed as under:-

> "It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances; while fixing a line of point is necessary and there is no mathematical date or way of fixing it, precisely the decision of the Legislature or its delegate must be accepted unless it is very wide of reasonable mark (University Grants Commission v. Sadhana Chaudhary, (1996) 10 SCC 536). The learned counsel for the respondents was not in a position to point out any ground for holding that the said date is capricious or whimsical in the circumstances of the case."

9. In ***Bhupinderpal Singh v. State of Punjab***, (2000) 5 SCC 262, the Supreme Court placed reliance upon large number of its earlier judgments, particularly in ***Ashok Kumar Sharma v. Chandra Sekhar***, (1997) 4 SCC 18, ***Andhra Pradesh Public Service Commission v. B. Sharat Chandra***

(1990) 2 SCC 669 and ***M.V. Nair4 (Dr.) V. Union of India***, (1993) 2 SCC 429 and observed as under:-

> " The High Court has held that (i) the cut off date, by reference of which the eligibility required must be satisfied by the candidate seeking a public employment, is the date appointed by the relevant rules and if there be no cut off date appointed by the rules then such date, as may be appointed for the purpose in the advertisement seeking for application; (ii) that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed, by which the application has been received by the Authority. The view taken by the High Court is supported by several decisions of the Court and is, therefore, well settled and hence cannot be found fault with.

10. The said judgment was considered and approved by the Supreme Court in ***Jasbir Rani and others v. State of Punjab and others*** (2002) 2 SCC 124. Similarly, in ***State of West Bengal and another v. West Bengal Government Pensioners Association and others***, (2002) 2 SCC 179, the Supreme Court approved the cut-off date fixed by the State for the purpose of revising the pay scale, observing that the cut-off date cannot be set aside unless on the facts it is proved to be arbitrary and unreasonable. (*emphasis supplied*)

11. In the facts of the instant case, basically two circumstances are to be considered. The first being the eligibility criteria as prescribed in Clause-8 of the prospectus which the petitioner has fulfilled and the second being that the seat to which the petitioner seeks admission is Super Speciality Course and the object to be achieved by the entrance test is to select the most suitable candidates to take admission to such course, so that the State can produce "quality doctors". By fixing the cut-off date as 31.3.2009, though the last date for submission of application was 22.6.2009, persons acquiring the minimum qualification required to appear in the entrance test after 31.3.2009, but within 22.6.2009 are debarred from appearing in the said test. There can be no distinction between the candidates who have acquired the minimum qualification as prescribed in Clause – 8 of the prospectus prior to 31.3.2009 and after 31.3.2009 but within the last date fixed for submission of the application form.

12. Applying the ratio of the decisions cited above, it would be amply clear that an artificial classification has been made between the doctors, who acquired the minimum qualification to sit in the entrance test prior to 31.3.2009 and the doctors who acquired such qualification after the said date but before the last date fixed for subjmission of forms. Such a classification violates the mandate of Article 14 of the Constitution inasmuch as the cut-off date fixed has no reasonable nexus with the object to be

achieved, i.e., selecting the best candidates. It can further be noted here that the petitioner, in spite of the fact that he produced all his documents along with the application form and though according to the State was found neligible, was allowed to sit in the entrance test and was placed in the second rank in order of merit in the selection showing that he is more meritorious than the persons placed below him was denied to take admission. Thus, debarring the petitioner from taking admission to the Super Speciality Course, 2009 clearly amounts to discrimination in violation of the mandate of Article 14 of the Constitution.

13. This Court, therefore, has no hesitation to hold that fixing a cut-off date as 31.3.2009 in Clause – 1.3 of the prospectus being arbitrary and unreasonable resulting in violation of Article 14 of the Constitution cannot be sustained. Thus, the said cut-off date fixed as 31.3.2009 is held to be illegal and arbitrary and the petitioner is directed to be given admission to the seat which has been kept vacant pursuant to the interim order passed by this Court earlier. Such admission should be given to him within a period of one week from the date of production of a certified copy of this order before the opp. party no. 3 – Principal, S.C.B. Medical College, Cuttack, as it is submitted by Mr. R.C. Mohanty that the last date for giving admission to such course is over since 30.9.2009, but as this writ petition is pending before this Court from 7.7.2009 and could not be disposed of earlier due to intervention of the Puja Vacation inasmuch as no person can be made to suffer due to act of the Court, the above direction is given to give admission to the petitioner.

14. With the aforesaid directions, the writ petition is disposed of.

2010 (I) ILR-CUT- 220

R.N.BISWAL,J.

TAPAN KUMAR SAMANTA -V-COLLECTOR-CUM-DISTRICT MAGISTRATE,BALASORE & ORS.*

DECEMBER 24,2009.

ESSENTIAL COMMODITIES ACT,1955 (ACT NO.10 OF 1955) – SEC.6(A).

Seizure of P.D.S.wheat along with the Truck – Seizure made by the A.S.I. of Police – Not authorized to make seizure in view of Sub-Clause(a) of Clause 23 of the P.D.S (Control) Order, 2008 – Held, seizure being illegal the proceeding U/s.6(A) of the E.C.Act can not sustain. (Para 8)

Case laws Referred to:-

1.(2007)37 OCR (SC) 586 : (Kailash Prasad Yadav & Anr.-V-State of Jharkhand)

2.Crimes Vol.VIII.1990(2) 744 : (Nand Kishore Singh -V-State of Bihar,Patna High Court).

3.2004(2)ALD(Crl.)314(A.P.) : (Sankar Lalmaniyar & Anr.-V-State of A.P.).

4.Crimes Vol.VIII 1988(2) 963 : (Ram Chandra Pansani -V-State of Bihar, Patna High Court).

ForPetitioner– M/s.DayanandaMohapatra,M.Mohapatra, G.R.Mohapatra, S.P.Nath.

For Opp.Parties – Addl.Govt.Advocate.

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*W.P.(C0 NO.12797 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

R.N.BISWAL, J. The fact giving rise to filing of the writ petition is that on 24.7.2009 at about 10.30 P.M. while the A.S.I. of Remuna Golei Out-Post along with some constables was engaged in patrol duty, he received information that four trucks being loaded with P.D.S. wheat were standing near NESCO office, instead of being driven to their respective destination, with a view to black marketing the wheat. So, the A.S.I., Remuna Golei Out-post lodged a written report before the Inspector In-Charge Industrial Area Police Station, Balasore, on the basis of which P.S. case No.110 of 2009 was registered under Sections 468/471/120-B of I.P.C. read with Section 7 of the Essential Commodities Act (hereinafter referred as E.C. Act) giving rise to C.T. case No.1381 of 2009 of the court of learned S.D.J.M., Balasore. The case was investigated into, in course of which, the I.O. (A.S.I. of Remuna Golei Out - post) seized the wheat along with the trucks, prepared seizure list in respect thereof and reported this fact to the Collector, Balasore and requested him to initiate a proceeding under Section 6 (A) of the E.C. Act. After completion of due formalities, the Collector initiated Essential Commodities Case No.32 of 2009. As an interim measure, on 14.8.2009 the Collector, Balassore directed the local C.S.O. to account for the wheat in the

P.D.S. quota of Balasore Municipality and to reduce its proportionately and to deposit the sale proceeds thereof in appropriate account of the Government.

2. The case of the petitioner is that he is the owner of a flour mill. He arranged truck No.OR-O1L 8713 belonging to Manas Kumar Jena on hire, purchased the wheat from free market, got the same loaded in the said truck and while the loaded truck was standing in front of Industrial Police Area, Balasore P.S., the police seized the wheat along with the truck illegally. The present writ petition has been filed to quash the proceeding in E.C. case No.32 of 2009, set aside the interim order dated 14.8.2009 and to release the stock in favour of the petitioner.

3. Learned counsel appearing for the petitioner submitted that as per Clause 23 of the Orissa Public Distribution System (Control) Order,2008 (herein after referred as P.D.S. Control Order, 2008) the Licensing authority or any other officer authorized by Govt**.** in that behalf, can only search and seize any essential commodity in consonance with the provision contained under Section 102 of Cr.P.C. The Govt. in their Food Supplies and Consumer Welfare Department Notification No.7450-FS.IC.2/2008 dated 29th March,2008 specified a list of the officers authorized to exercise the power conferred under Section 23 of the P.D.S. Control Order,2008. No police personnel is included in the said list. So, according to learned counsel for the petitioner, the so-called P.D.S. wheat along with the truck having not been seized by any of the officers authorized to seize the same, the seizure was illegal, and, as such, the proceeding initiated under Section 6 (A) of the E.C. Act could not stand and consequentially, the impugned order passed by learned Collector, Balasore would also fail. In support of his submission, he relied on the decisions in the case of **Kailash Prasad Yadav and another** vs. **State of Jharkhanda** (2007)37 OCR (S.C.) 586, **Nand Kishore Singh** vs. **State of Bihar, Patna High Court** Crimes Volume-VIII, 1990 (2), 744, **Sankar Lalmaniyar and another v. State of Andrapradesh** 2004 (2) ALD (Crl.) 314 (A.P) and **Ram Chandra Pansari** vs. **State of Bihar, Patna High Court** crimes Volume-VIII, 1988 (2), 963.

4. On the other hand, learned Addl. Govt. Advocate contended that as per Section 102(1) of Cr.P.C. any police officer can seize any property which may be alleged or suspected to have been stolen or which may be found under circumstances, which creates a suspicion of commission of any offence. No notification under clause 23 of P.D.S. Control (Order), 2008 vesting power to a police officer to make search and seizure is required. In the present case the driver of the petitioner's truck instead of driving the truck to its destination, droves it to some other place to sell the wheat in black market. Since the conduct of the driver created suspicion of commission of an offence under section 6 of the E.C. Act, the police officer

rightfully seized the wheat along with the truck. Learned Additional Government Advocate further submitted that P.D.S. (Control)Order, 2008 came into force with effect from 19.3.2008. The notification under clause 23 of the said order was issued on 29.3.2008. The said notification can not over side the E.C. Act.

5. Now, the only point to be considered is whether a police officer is competent to seize P.D.S. wheat along with the truck on suspicion that the said wheat was to be sold in black market and on the basis of that seizure, confiscation proceeding under Section 6(A) can be initiated.

6. In exercise of the powers conferred by Section 3 of the Essential Commodities Act, 1955 (10 of 1955), read with Paragraph 5 of the Annexure to the Public Distribution System (Control) Order, 2001, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), No.434, dated the 31st August, 2001 and the notification of Government of India, in the Ministry of Agriculture and Irrigation (Department of Food), GSR 800, dated the 9th June, 1978, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), dated the 17th June, 1978 and the notifications in the Ministry of Industry and Civil Supplies (Department of Civil Supplies and Co-operation) No.S.O.681 (E) and S.O. 682 (E) both dated the 30th November, 1974, published in the 'Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), dated the 30th November, 1974, the State Government made the O.P.D.S. (Control) Order, 2008. Clause 23 of the said order reads as follows:-

> **"23. Power of entry, search and seizure etc.** (a)-The Licensing Authority or any other officer authorized by Government in this behalf, may, with such assistance, if any, as he thinks fit:
>
> (i) require the owner, occupier or any person in charge of the place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any license issued there under has been, is being or is about to be committed, to produce any books, accounts or other documents showing transactions relating to such contravention;
>
> (ii) enter, inspect or break open any place, premises, vehicles or vessels in which he has reason to believe that any contravention of the provisions of this order or of the conditions of any licence issued there under has been, is being or is about to be committed;
>
> (iii) take or cause to be taken extracts from or copies of any documents showing transactions relating to such contravention which are produced before him/her;
>
> (iv) test or cause to be tested the weight of all or any of the essential commodities found in any such premises;

Provided that in entering upon and inspecting any premises the persons so authorized shall have due regard to the social and religious customs or the persons occupying the premises.

(v) search, seize and remove the stocks of the essential commodities and the packages, coverings, animals vehicles, vessels or other conveyances used in carrying the said essential commodities in contravention of the provisions of this order or of the conditions of any licence issued there under and thereafter take or authorize the taking of all measures necessary for securing the production of the essential commodities and the packages, coverings, animals, vehicles, vessels or any other conveyances so seized in a Court and for their safe custody pending such production.

(b) The provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) relating to search and seizure shall so far as may be, apply to searches and seizures under this clause."

Pursuant to the above provision, the State Government in their Food Supplies and Consumer Welfare Department vide notification dated 29.3.2008 specified the officers who can exercise the power of entry, search and seizure etc., but no police officerhas been so specified. .This notification having been issued in exercise of the powers conferred by sub-clause (a) of Clause 23 of the P.D.S.(Control) Order, 2008. as stated earlier it cannot be said that it is only an executive instruction. Accordingly, the submission of learned counsel for the petitioner in this regard cannot be sustained.

7. In the decision Kailash Prasad Yadav (supra), the apex court in reference to a case under Section 6 (A) of the E.C. Act, held that valid seizure is a sine qua none for passing an order of confiscation of property. In the case of Nanda Kishore Singh (supra) it was held that where the seizure was made by a person not competent to seize the essential commodities, such seizure being illegal, the proceeding under Section 6 (A) of the E.C. Act cannot stand. As per Rule 12 of Bihar Kerosene Oil Dealers Licensing Order any Licensing Authority or any Executive Magistrate, Special Officer In Charge Rationing and an officer not below the rank of Sub-Inspector etc. can make search and seizure, remove stock of kerosene oil, but in the aforesaid case sisnce an A.S.I. made the search and seizure it was held to be illegal. In the case of Shankar Lal Maliya and others it was held that the authorities, mentioned in the control order are competent to search and seize the goods transported in violation of the control order and not the vigilance officers mentioned under the Act and in that view of the matter Section 6(A) of the Act cannot be invoked and search and seizure appears to be not valid for want of jurisdiction, so also the view taken by Patna High Court in the case of Rama Chandra Ansari(supra).

8. In the case at hand since a police officer who was not authorized to make seizure, seized the so called P.D.S. wheat, the seizure itself being illegal, the proceeding under Section 6(A) of the E.C. Act cannot sustain.

9. Accordingly, the E.C. case no.32 of 2009 of the file of learned Collector, Balasore is hereby quashed and the wheat seized be released in favour of the petitioner forthwith. Consequentially, the interim orders passed by the Collector also stand quashed.

The writ petition is disposed of. No cost.

2010 (I) ILR-CUT- 225

R.N.BISWAL,J.

MADHU SUDAN SAHU -V- STATE OF ORISSA & ORS.*

NOVEMBER 24,2009.

Appointment – Post of multipurpose Assistance – Minimum qualification 10+2 passed – Petitioner passed +2 Arts having secured 46.89 marks – O.P.5 passed Upasastri stated to be equivalent to +2 and secured 51.1 marks and got appointment which is under challenge.

As per advertisement minimum qualification fixed was 10+2 and there was nothing to show that Candidates having equivalent qualification also eligible for the post – Held, O.P.5 may be removed from service as he was not eligible to hold that post and in his place petitioner shall be given appointment.

(Para 8 & 11)

For Petitioner – M/s.Bijaya Kumar Patnaik , A.C.Gahan.

For Opp.Party – M/s.G.Mukherjee, P.Mukherjee, A.C.Panda, S.Patra. (Opp.Party No.5)
Addl.Govt.Advocate (Opp.Parties 1 to 4).

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*W.P.(C) NO. 4882 OF 2007. In the matter of an application under Articles 226 & 227 of the Constitution of India.

R.N.BISWAL, J. The case of the writ petitioner is that pursuant to the advertisement under Annexure-3 dated 28.9.2006 in the daily English Newspaper, he offered his candidature for the post of Multi purpose Assistance (Gram Rojgar Sevak) in respect of Solabandh Gram Panchayat under Patnagarh Block. As per the advertisement, the minimum qualification for the said post was 10+2 passed. It was further stated therein that the applicants of Commerce stream and applicants with computer proficiency of 'O' level with use of oriya language in computer would be preferred. The petitioner has passed +2 Arts in C.H.S.E. Examination in the year 2002 having secured 46.89 marks. He completed 12 months' course in Diploma in Computer Application. But instead of selecting him one Bidyadhar Majhi, who was ineligible for the post, was selected.

2**.** Being aggrieved with the said selection, petitioner made a representation to the Project Director *D.*R.D.A., Bolangir (opposite party No.3), but it was not attended. So, he filed W.P.(C) No.16809 of 2006 before this Court, which was disposed of on 27.1.2007 with direction to finalize the representation within one month from the date of receipt of that order. Instead of considering the case of petitioner, opposite party No.3 gave appointment to Sarat Kumar Das (opposite party no.5), under Annexure-1 though he had no requisite qualification for the post. Hence, the petitioner filed the present writ petition praying to quash Annexure-1 and to direct the opp. parties to recommend his name for the post of Gram Rozgar Sevak in respect of Solabandh Grama panchayat.

3. Learned counsel appearing for opposite party no.5 contended that opposite party No.5 passed Upasastri from Sri Jagannath Sanskrit Viswa Vidyalaya, Puri which is equivalent to +2. He secured 51.1 percentage of mark therein. None of the other applicants could secure that much of marks. Opposite party no.3 by his letter dated 14.11.2006 made it clear that 'O' level certificate issued by Govt. of India would be considered and no other certificates like D.C.A. and P.G.D.C.A. Since none of the candidates could produce 'O' level certificate being issued by the Govt. of India, qualification with regard to computer was not taken into consideration in favour of any of them. Opposite party no.5 having secured the highest mark in +2 level was rightly selected.

4. As against this, learned counsel for the petitioner submitted that as per the advertisement, the minimum qualification for the post was 10+2**.** There was nothing to show that candidate having equivalent qualification of 10+2 would be also eligible to the post of Gram Rojagar Sevak. He further submitted that as per the advertisement the last date of submission of application was 28.10.2006. At that time the Equivalence Committee had not declared Upasastri as equivalent to 10+2 pass. Annexure D/5, shows that opposite party no.5 passed Upasastri in the month of August 2001 from Shri Jagannath Sanskrit Viswa Vidyalaya. But, there is nothing to indicate that the Equivalence Committee declared Upasastri equivalent to 10+2 pass prior to 28.10.2006. So, Opposite party no.5 cannot be said to have passed 10+2 or any equivalent examination thereof till 28.10.2006, and, as such, he was not eligible for the post at all.

5. Per contra, learned counsel for the opposite party no.5 submitted that the Equivalence Committee vide notification dated 3.5.1996 declared Acharaya as equivalent to M.A. in Sanskrit. Opposite party no.5 passed Acharya in the year 2006 and was placed in 1st class. M.A. in Sanskrit being much higher than 10+2, his appointment cannot be declared illegal. Learned counsel for the petitioner further submitted that opposite party no.5 also underwent 12 months' course in specified curriculum with Grade B+2 and passed PGDCA from Patnagarh and was issued with a certificate in that respect under Annexure-B/5. If the qualification of the petitioner in respect of computer application is accepted, the qualification of opposite party no.5 in that respect cannot be ignored. According to him since opposite party no.5 secured more marks than the petitioner, he was rightly selected.

6. A Division Bench of this Court in W.A.No.13 of 2008 held that until the Equivalence Committee declared that Upasastri was equivalent to 10+2, it could not be held that a candidate, passing Upasastri would be treated to have passed 10+2. So, even if such a candidate passed Acharya and it was declared by the Equivalence Committee to be equivalent with M.A. in

Sanskrit earlier than the last date fixed for submission of application, it cannot help him to get a job meant for 10+2 pass candidate.

7. On perusal of Annexure B/5 it is found that opposite party no.5 obtained PGDCA certificate in computer on 10th day of November, 2006-after the last date fixed for submission of application for the post of Gram Rojagar Sevak. So his qualification under Annexure B/'5 cannot be taken into consideration.

8. Moreover, since the minimum qualification fixed in the advertisement was 10+2 and there was nothing to show that candidates having equivalent qualification thereof were also eligible to apply for the post, opp. party No.5 was not eligible to hold that post. The petitioner being a 10+2 pass candidate having qualification in computer application should have been preferred**.** Submission of learned counsel for opposite party no.5 that it was notified that 'O' level certificate issued by Govt. of India would only be given preference, cannot be accepted since the same is contrary to the advertisement, particularly when there is nothing to show that there was a corrigendum to that effect.

9. Furthermore, in writ petition No.16809 of 2006 this court held as follows:

"In our considered opinion, as the petitioner has already filed a representation before the Project Director, D.R.D.A. Bolangir-O.P.No.3, it would be appropriate if opposite party No.3 takes a decision on the grievance of the petitioner.

Let the petitioner appear before the Project Director, D.R.D.A.-O.P.No.3 along with a copy of this order. Opposite party No.3 is directed to take a decision on the representation of the petitioner after giving opportunity of hearing to the petitioner as well as opposite party no.5-Bidyadhar Majhi, whose name is stated to have been recommended for such appointment. The entire exercise shall be completed with a period of one month from the date of communication of this order."

10. Thus, it was specifically directed to the Project Director, D**.**R.D.A. to take a decision on the representation of the petitioner after giving opportunity of hearing to the petitioner as well as opposite party No.5, Bidyadhar Majhi, in stead, as it appears, he gave opportunity of hearing to the present opposite party no.5, Sarat Kumar Das also, which is against the direction of this Court.

11. Under such circumstances, the writ petition is allowed, opposite party no.5 be removed from service and in his place the petitioner shall be given appointment to the post of Gram Rojagar Sevak in respect of Solabandh Grama Panchayat on due compliance of all formalities.

Writ petition allowed.

2010 (I) ILR-CUT- 228

R.N.BISWAL,J.

PURNA CHANDRA NAYAK & ORS.-V-NISAKAR NAYAK.*

DECEMBER 15,2009.

CIVIL PROCEDURE CODE,1908(ACT NO 5 OF 1908)-ORDER 6,RULE 17

Amendment of written statement – Suit for permanent/mandatory injunction – By way of amendment defendants wanted to insert in the written statement that they have purchased the disputed land from the competent authority after the written statement was filed – No explanation has been given for the delay in filing the petition – Held, learned trial Court rightly did not allow the amendment.

(Para 5)

Case law Referred to:-

1.2006 (Supp-II) OLR.525 : (Puena Chandra Samantray & ors.-V-Sarada Prasad Satyanarayan Samantaray).

2.AIR 2009 SC1177 : (South Konkan Distrilleries & anr.-V-Prabhakar Gajanan Naik & ors.)

3.2006 (Supp-II) OLR 529 : (Pravat Kumar Manadhata -V-Addl.Distrtict Magistrate,Khurda & ors.).

For Petitioner – M/s.P.Kar, A.K.Mohanty, G.D.Kar & M.R.Satapathy.

For Opp.Party – M/s.B.Ojha, A.B.Lenka.

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*W.P.(C) NO.16778 OF 2009. In the matter of an application under Articles 226 & 227 of the Constitution of India.

R.N.BISWAL ,J. In this writ petition, the petitioners challenged the order dated 19.10.2009 passed by learned Civil Judge (Junior Division), 1st Court, Cuttack in C.S. No.89 of 2003 rejecting the petition under Order-6, Rule-17 C.P.C.

2. Opposite party as plaintiff filed the aforesaid suit against the petitioners-defendants for permanent and mandatory injunction in respect of suit land. As per his case consolidation plot No.1110 measuring an area of Ac 0.05 decimals under Khata No.397 corresponding to settlement plot No.1102 Khata No.489 was under the possession of Pramila Nayak, Sita Nayak, Sarat Kumar Sendha and others. In an amicable settlement the said plot was allotted to Pramila Nayak, Sita Nayak and Sarat Kumar Sendha over which Pramila Nayak had 8 annas share and both Sita Nayak and Sarat Kumar Sendha had 8 annas share. Plaintiff purchased Ac.0.02 decimals 5 Kadis of land on the southern side of the said land through the Registered sale deeds dated 15.12.2009 and 15.4.2003 for a consideration of Rs.3,750/-. The petitioners-defendant illegally and forcibly uprooted the green fence and made a pucca construction over the western side measuring 15 x 140 kadis of the said land, as such he filed the suit for mandatory injunction for pulling down the illegal construction made by the defendant-petitioners and for permanent injunction. The defendant-

petitioners in their written statement contended that in 1929 ROR the disputed land was recorded in the name of Govinda Chandra Nayak and Laxman Nayak. Govinda Chandra Nayak sold his share to Panchanan Sahu. In 1970 ROR the said land was recorded in the name of Muralidhar Nayak, Bansidhar Nayak, both sons of Laxman Nayak and Panchanan Sahu. Bansidhar Nayak died unmarried leaving behind his brother Muralidhar Nayak and as such the interest of Bansidhar Nayak over the said land devolved upon Muralidhar Nayak. So, Panchanan Sahu and Murlidhar Nayak had equal share in the said property. During the life time of Panchanan Sahu and Murlidhar Nayak, there was an amicable partition between them in which Muralidhar Nayak was allotted Ac 0.02 decimals 5 kadis to the Northern side and Panchanan Sahu was allotted with the rest portion of the land. Panchanan Sahu sold his share to Sita Nayak and Sarat Kumar Sendha. Murlidhhar Nayak orally sold his share of Ac.0.02 decimals 5 kadis of land to the father of the defendants on 15.3.1983 and delivered possession of the same to him and after his death the defendant-petitioners being his sons are in the possession of the same. As abundant caution, the widow of Murlidhar Nayak and his son executed a registered sale deed on 30.7.2003 in favour of the defendants-petitioners in respect of the self same land. So, the defendant-petitioners having valid title over the suit land are in continuous and uninterrupted possession over it since 1983 within the knowledge of all concerned including the plaintiff.

3. On 11.9.2009 the defendant-petitioners filed a petition under Order-6, Rule-17 C.P.C. for amendment of their written statement to the effect that they purchased the suit land from the competent authority of Jagannath Temple as mentioned in detail in the petition. The trial court rejected the said petition on the ground that the defendants by way of amendment want to make a new case by way of counter claim which is not permissible under Order 8 Rule-6 (A) of CPC; that one distinct cause of action could not be substituted for another cause of action; that the delay in filing the amendment petition was not explained and that the amendment sought for was not necessary for just decision of the case. Being aggrieved with the said order, the defendants have preferred the present writ petition.

4. Learned counsel appearing for the petitioners contended that the prayer for amendment of written statement should not be considered with the same strictness as prayer for amendment of plaint. The defendant can take different grounds in his written statement. In the present case, since there was stay of further proceeding of the aforesaid suit, by order of this Court the petitioner-defendants did not file the amendment petition earlier. Hence, he prayed to dismiss the impugned order and allow the writ petition.

5. No doubt, the courts should be liberal in allowing amendment petition in respect of written statements but it does not mean as held by this Court in

the case of **Puena Chandra Samantaray and others v. Sarada Prasad Satyanarayan Samantaray** 2006 (Supp-II) OLR-525 that self destructive pleadings can be allowed in amendment. In the present case, in their written statement the petitioner-defendants contended that Muralidhar Nayak orally sold his share of Ac O.2 decimal 5 kadis of land (suit land) to the father of the defendants on 15.3.1983 and delivered possession of the same to him. After the death of their father the petitioners-defendant possessed the same. Again the widow of Muralidhar Nayak and his son executed a registered sale deed on 30.7.2003 in favour of the petitioners-defendant. By way of amendment, they wanted to insert in the written statement that on 8.5.2007 they purchased the disputed land along with other land claimed by the opposite party-plaintiff to be his own from the competent authority of Jagannath Temple, by way of counter claim. Since the petitioner-defendants claim to have purchased the land from the competent authority of Jagannath Temple after the W.S. was filed, the trial court rightly held that it was not permissible under law. In the amendment petition no explanation has been given with regard to delay in filing the petition. In absence of any explanation, the trial court rightly did not allow the amendment petition, as held in the cases of **South Konkan Distilleries & Another v. Prabhakar Gajanan Naik & Others** AIR 2009 Supreme Court 1177 and **Pravat Kumar Manadhata v. Addl. Dist5rict Magistrate, Khurda and others** 2006 (Supp.-II)OLR-529.

6. I do not find any illegality or perversity in the order under challenge, to be interfered with by this Court in writ jurisdiction and accordingly the writ petition stands dismissed. No cost.

Writ petition dismissed.

2010 (I) ILR-CUT- 231

I.MAHANTY,J.

L.P.ELECTRONICS(O) PVT.LTD. & ANR. -V- TIRUPATI ELECTRO MARKETING PVT.LTD.

DECEMBER 23,2009.

NEGOTIABLE INSTRUMENT ACT,1881 (ACT NO.26 OF 1881) – SEC.138.

Opp.Party filed Complaint petition U/s.138 N.I. Act against the petitioner – Petitioner filed Civil Suit for settlement of accounts after receipt of notice in the complaint case – Petitioner filed this petition to quash the complaint proceeding or to say further proceeding in the complaint case till disposal of the Civil Suit.

Held, both Civil and Criminal Proceeding can proceed simultaneously and mere filing of a Civil suit by the petitioner after notice U/s.138 N.I.Act can not empower the petitioner to seek quashing of the proceeding U/s.138 N.I.Act or to stay further proceedings of the said case – Petition for quashing is dismissed.

(Para 9)

Case laws Referred to:-

1.(2000) 3 SCC 269 : (M/s.Medchi Chemicals & Pharma P.Ltd.-V-M/s.Biological E.Ltd.& Ors.).
2.(2009)42 OCR (SC) 241 : (M/s.Sri Krishna Agencies -V-State of A.P.& Anr.)
3.(1999)8 SCC 686 : (Trisuns Chemical Industry -V-Rajesh Agarwal & Ors.).
4.(2009)43 OCR (SC) 324 : (Smt.Rumi Dhar -V-State of West Bengal & Anr.)
5.(1996)3 SCC 87 : (State of Rajasthan -V-Kalyan Sundaram Cement Industries Ltd. & Ors.).
6.2007(II)OLR 136 : (Korp Gems (India) Pvt.Ltd. & Anr.-V-Suraj Products Ltd.).
7.AIR 2004 sc 408 : (Goa Plast(P) Ltd.-V-Chico Ursula D'Souza).

For Petitioners - M/s.Banshidhar Baug, S.Rath & P.C.P.Das.

For Opp.Party - M/s.Debasis Das & D.K.Mohapatra.

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*CRLMC NO.1977 OF 2008. In the matter of an application under Section 482 of the Code of Criminal Procedure.

I.MAHASNTY, J. In the present application under Section 482 of the Code of Criminal Procedure, prayer has been made by the petitioner to quash the criminal proceeding in 1.C.C. Case No.847 of 2008 filed under Section 138 of the Negotiable Instrument Act pending before the learned S.D.J.M., Bhubaneswar and/or to direct stay of further proceeding till disposal of C.S. No.91 of 2008 pending in the court of learned Civil Judge (Senior Division), 1st Court, Cuttack.

2. Mr. Banshidhar Baug, learned counsel for the petitioners submitted that the petitioners had issued a letter to the Opposite Party-claimant on 19.10.2007 requesting them to settle the accounts and the outstanding

claims of the petitioners and claim that after adjustment of all outstanding claims of the petitioners with the opposite party, was entitled to get an amount of Rs.28,293.70 from the petitioners. Based on such an assertion, the petitioner enclosed the Account Payee cheque for the self-same amount drawn on ICICI Bank, Cuttack and requested the opposite party-complainant to return back the blank cheque bearing No.006033 of the State Bank of India, Cuttack City Branch which had been handed over to the opposite party-complainant in May 2007, as security. It is further alleged that the said letter was addressed to the complainant but the same was received by one of its employees, who used to go to the petitioners' show-room at Cuttack either for giving delivery of materials or for collecting payments from the petitioners.

The petitioners further submission is that, although the opposite party-complainant received the said letter dated 19.10.2007, but did not give any reply thereto and instead, the complainant sent a letter dated 17.12.2007, claiming therein that an amount of Rs.6,27,281/- was outstanding against the petitioners in terms of their book of accounts. It is further contended that in support of the petitioners' reply to the complainant's letter dated 17.12.2007, Petitioner No.2 was threatened by the complainant-company that they would seek encashment of the blank cheque given by the petitioners as security. Based on such an apprehension the petitioners wrote to the Bank i.e. State Bank of India, Cuttack City Branch on 24.12.2007, requesting them to effect "stop payment" of cheque No.006033, if presented for encashment. It is further stated on behalf of the petitioners that the opposite party-complainant filled-up the said blank cheque given to it as security with an amount of Rs.6,20,637/- and placed it for encashment, which was dishonoured and returned on 27.12.2007 on "stop payment" as per instruction issued by the petitioners to its bankers.

Learned counsel for the petitioners further asserts that Petitioner No.1 at the relevant time i.e. on 24.12.2007 as well as on 27.12.2007 had sufficient funds in its account to honour the said cheque but since there was dispute regarding the quantum of entitlement of the opposite party-complainant, the petitioners had issued instructions to its bankers to make stop payment.

3. From the pleadings, it further appears that, on the return of the cheque by the bank on 27.12.2007, the opposite party-complainant on 8/10.1.2008 issued statutory notice, under Section 138 N.I.Act to the present petitioners followed up with a subsequent notice dated 15.1.2008. It is stated that the petitioners responded to the said notice under cover of its letter dated 31.1.2008.

4. In paragraph-19 of the petition, it is stated that after opposite party-complainant issued notice under Section 138 N.I.Act and after giving reply

thereto by the petitioners on 31.1.2008, the petitioners filed C.S. No.91 of 2008 in the court of the learned Civil Judge (Senior Division), 1st Court Cuttack on 18.2.2008. The suit was filed with a prayer for settlement of accounts between the petitioner and opposite party-complainant and for a decree that the opposite party is only entitled to receive Rs.28,294/- from the petitioners. The said suit remains pending as on date.

5. It is further stated that during pendency of the aforesaid suit No.91 of 2008, which was filed on 18.2.2008, the Opposite Party-complainant initiated 1.C.C. Case No.847 of 2008 in the court of the learned S.D.J.M., Bhubaneswar under Section 138 N.I.Act. In this proceeding, learned S.D.J.M., Bhubaneswar after taking cognizance in the said case under Section 138 N.I.Act, directed issue of process against the petitioners and other Directors of the company.

6. Sri Baug, learned counsel for the petitioners, inter alia, submitted that since the civil suit had been filed by the petitioners and was pending regarding settlement of account, the further continuance of the criminal proceeding, during pendency of the civil suit is not permissible under law and the same amounts an abuse of the process of court. In the light of the aforesaid contentions, the petitioners have prayed to either quash the criminal proceeding in 1.C.C. Case No.847 of 2008, initiated under Section 138 N.I.Act pending in the court of the learned S.D.J.M., Bhubaneswar and/or in the alternative, had sought for direction for stay of further proceeding in the said complaint case, pending disposal of Civil Suit No.91 of 2008 in the court of Civil Judge (Sr. Division), 1st Court, Cuttack.

7. Shri Debasis Das, learned counsel for the Opposite Party-complainant, on the other hand, stated that it is well settled in law by the Apex Court in the case of **M/s. Medchi Chemicals & Pharma P. Ltd. Vs. M/s. Biological E. Ltd. & others,** (2000) 3 SCC 269, that both criminal law and civil law remedy can be pursued in diverse situations. Whereas the object of criminal law is to punish an offender who commits an offence against a person, property or the State for which the accused, on proof of the offence, is deprived of his liberty and in some cases even his life but this does not however affect civil remedies at all, for suing the wrongdoer. It is anathema to suppose that when a civil remedy is available, a criminal prosecution is completely barred. Therefore, the two types of actions, namely, civil and criminal are quite different in content, scope and impart.

He placed further reliance in the case of M/s. **Sri Krishna Agencies v. State of A.P. & Another,** (2009) 42 OCR (SC)-241. In the said judgment, the Hon'ble Supreme Court has categorically laid down the principle that, there can be no bar to the simultaneous continuance of a criminal proceeding and a civil proceeding, if the two arise from separate causes of action. In the said case the complainant in Section 138 N.I.Act had been

initiated since "stop payment" orders were issued by the drawer. It was contended on behalf of the drawer that since the drawee had taken recourse to arbitration proceedings, the dispute was obviously civil in nature and the criminal complaint could not be proceeded with. The High Court had accepted the aforesaid contention of the drawer and had quashed the complaint.

The Hon'ble Supreme Court while placing reliance on the judgment rendered in the case of **Trisuns Chemical Industry v. Rajesh Agarwal and others,** (1999) 8 SCC 686, where a similar question arose in relation to arbitration proceeding and a complaint was filed under Sections 415 and 420 Cr.P.C. In the said decision, it was held that, mearly because arbitration proceeding had been undertaken, a criminal proceedings could not be thwarted. Placing reliance on the aforesaid judgment, their Lordships of the Supreme Court came to hold that "there can be no bar to the simultaneous continuous of a criminal proceeding and civil proceeding if two arise from the separate causes of action."

Reliance was also placed by the learned counsel for the opposite party-complainant on a further judgment of the Hon'ble Supreme Court rendered in the case of **Smt. Rumi Dhar v. State of West Bengal and another,** (2009) 43 OCR (SC)-324 wherein the Division Bench presided over by the Hon'ble Justice S.B.Sinha came to hold in paragraph-18 thereof which is as follows:

> "18. It is now a well settled principle of law that in a given case, a civil proceeding and a criminal proceeding can proceed simultaneously. Bank is entitled to recover the amount of loan given to the debtor. If in connection with obtaining the said loan, criminal offences have been committed by the persons accused thereof including the officers of the bank, criminal proceedings would also indisputably be maintainable. When a settlement is arrived at by and between the creditor and the debtor, the offence committed as such does not come to an end. The judgment of a tribunal in a civil proceeding and that too when it is rendered on the basis of settlement entered into by and between the parties, would not be of much relevance in a criminal proceeding having regard to the provisions contained in Section 43 of the Indian Evidence Act."

Shri Das also placed reliance on an another judgment in the case of **State of Rajasthan v. Kalyan Sundaram Cement Industries Ltd. and others**, (1996) 3 SCC 87, whereby the Hon'ble Supreme Court came to hold that the complainant, after issuing notice under Section 138 N.I.Act filed a suit for recovery and also initiated a proceeding under Section 138 N.I.Act as well as under Section 420 I.P.C.. When the aforesaid action was challenged, the High Court directed stay of the civil proceedings pending disposal of the

criminal case. The Hon'ble Supreme Court came to hold that "it is settled law that pendency of the criminal matters would not be an impediment to proceed with the civil suits. The criminal court would deal with offence punishable under the Act. On the other hand, the courts rarely stay the criminal cases and only when the compelling circumstances require the exercise of power. We have never come across stay of any civil suits by the courts so far. The High Court of Rajasthan is only an exception to pass such orders. The High Court proceeded on wrong premise that the accused would be expected to disclose their defence in the criminal case by asking them to proceed with the trial of the suit." It is not a correct principle of law.

Sri Das also relied on a further judgment in the case of **Korp Gems (India) Pvt. Limited and another v. Suraj Products Ltd.,** 2007 (II) OLR 136 referred to by Hon'ble Shri Justice R.N.Biswal of Orissa High Court wherein, it is held that following the rule laid down by the Hon'ble Supreme Court in the case of **M/s. Medchi Chemicals & Pharma P. Ltd.** (supra), held that it cannot be said that, continuance of the criminal proceeding against the present petitioners would be abuse of process of the Court.

Sri Das further placed reliance on a judgment of the Hon'ble Supreme Court, in the case of **Goa Plast (P) Ltd. v. Chico Ursula D'Souza,** AIR 2004 SC 408 wherein His Lordship of the Supreme Court dealt with a "presumption of law" that arises under Section 139 N.I.Act in the following manner:

> "139. It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability.
>
> Thus it has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque

is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in Modi Cements Ltd. v. Kuchil Kumar Nandi, MANU/SC/0171/1998: 1998 CriLJ1397. On same facts is the decision of this Court in Ashok Yeshwant Badave v. Surendra Madhavrao Nighojakar, MANU/SC/ 0170/2001: 2001 CrlLJ 1674. The decision in Mode case overruled an earlier decision of this Court in Electronic Trade & Technology Development Corporation. Ltd. v. Indian Technologists & Engineers (Clectronics (P)Ltd., MANU/SC/0591/1996: 1996 CriLJ1692 which had taken a contrary view. We are in respectful agreement with the view taken in Modi case. The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.

Reliance was also placed on paragraph 17 of the judgment of this Court in the case of M.M.T.C. Ltd. and another v. Medchi Chemicals and Pharma (P) Ltd. and another MANU/SC/0728/2001: 2002 CRILJ 266 which reads as under:

There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents. Thus they have to discharge in the trial. At this stage, merely on the basis of averments in the petitions filed by them the High Court could not have concluded that there was no existing debt or liability."

8. In the light of the submissions and judgments noted hereinabove and after careful perusal of the pleadings in the present petition, it is clear therefrom that the Civil Suit No.91 of 2008 with a prayer to settle the accounts was filed by the petitioner only after receipt of notice from the opposite party-complainant under Section 138 N.I.Act. It is clear therefrom that after having issued instructions to the bankers to effect "stop payment" for the cheque issued to the complainant and after receiving notice from the complainant under Section 138 N.I.Act, knowing fully well, that the same would lead to the filing of a complaint under Section 138 N.I.Act, had gone ahead and filed the civil suit clearly for the purpose of trying to defend themselves in course of the impending proceeding before the criminal court.

Section 139 of the N.I.Act which has been dealt by the Hon'ble Supreme Court in the case of **Goa Plast (P) Ltd.** (supra), the presumption arising therefrom has been held to be a presumption in law that the cheque was issued for the discharge of any debt or liability and such presumption can only be rebutted by adducing evidence by those who seek to rebut the said presumption. Therefore, once the cheque was issued by a drawee, the presumption under Section 139 of the Act must follow and merely because the drawer issued notice to the drawee or to the bank for "stoppage of the payment" cannot prevent action under Section 138 N.I.Act by the drawee or the holder of the cheque in due course.

It is well settled in the case of **M/s. Medchi Chemicals & Pharma P. Ltd.** (supra) that in view of the presumption under Section 139 N.I. Act, the burden of proving that there was no existing debt or liability, was on the drawer of the cheque which he has to discharge in course of the trial and merely on the averments made by the petitioner herein, it cannot be concluded that there was no existing debt or liability.

9. In view of the aforesaid judgments of the Hon'ble Supreme Court, since it is well settled in law that both a civil and criminal proceeding can proceed simultaneously, the mere filing of a civil suit by the petitioner, after receipt of notice under Section 138 N.I.Act, cannot/does not empower the petitioner to seek quashing or stay of the criminal complaint. In view of the reasons as recorded hereinabove, I am constrained to observe that the present application under Section 482 Cr.P.C. merits no further consideration and is hereby dismissed. Interim order dated 12.12.2008 stands vacated. The learned S.D.J.M., Bhubaneswar is directed to proceed in the matter and dispose the 1.C.C. No.847 of 2008 expeditiously.

Application dismissed.

2010 (I) ILR-CUT- 238

SANJU PANDA,J.

ORISSA STATE ROAD TRANSPORT CORPN.& ANR.-V-BRUNDABAN SAHU & ANR.*

NOVEMBER 25,2009.

Pension – A post retirement benefit, benevolent in nature – After making the payment a condition of service, employer becomes a trustee in respect of the sum due and it has to assist the employee to get it as early as possible so that the employee utilizes the same in post retirement period.

With holding negligence in payment of pension by the employer – Employee is entitled to get interest at the rate given by the bank for the delay in making payment – Held, this Court feels it proper to grant interest at the rate of 8% per annum from the date of the decree till payment is made.

(Para 6 & 11)

Case laws Referred to:-

1.AIR 1987 SC 2257 : (O.P.Dutta -V-Union of India).
2.AIR 2001 SC 1109 : (State of Gujarat -V-Umedbhai Patel).

For Petitioners – M/s.Amiya Kumar Mohanty (A).
D.K.Behera & R.C.Pradhan.

For Opp.Parties – Narasingha Patra, A.K.Patra & B.N.Sarangi.
(For O.P.No.1)

*C.R.P.NO.322 OF 2003. From the order dated 31.10.2003 passed by the learned Civil Judge(Junior Division),Berhampur in Execution Proceeding No.3 of 2003.

S. PANDA, J. In this civil revision the judgment debtor-petitioner has challenged the order dated 31.10.2003 passed by the learned Civil Judge (Junior Division), Berhampur in Execution Proceeding No.3 of 2003 filed by opposite party no.1-decree holder. By the impugned order the decree holder was directed to file next step for execution of the decree.

2. The facts as narrated in the revision are as follows:

Opposite party no.1 as plaintiff filed Title Suit No.2 of 1985 before the learned Civil Judge (Junior Division), Berhampur for declaring that the premature retirement order passed by the defendant was void and illegal and he was entitled to uninterrupted service with full back wages. The said suit was decreed by the learned Civil Judge declaring the premature retirement of the plaintiff vide order dated 31.12.1984 as void and illegal and permanently restraining the defendants from giving effect to the said order. It was further declared therein that the plaintiff still continued to be in uninterrupted service and was entitled to full back wages. Against the said judgment and decree, the defendants preferred Title Appeal No.71 of 1988 before the learned 1st Addl. District Judge, Ganjam who, vide judgment

dated 12.5.1989 allowed the appeal and reversed the judgment and decree of the trial court. Challenging the said order, the plaintiff preferred Second Appeal No.208 of 1989 before this Court. This Court on 16.8.2002 set aside the judgment and decree passed by the lower appellate court and confirmed that of the trial court. Thereafter, the decree holder filed the execution case. He computed his claim amounting to Rs.12,22,497/- plus Rs. 2,20,250/- towards interest at the rate of 12 % per annum calculated upto 31.12.2002 plus cost of the suit. The judgment debtor filed its objection. The decree holder filed a revised calculation sheet of his claim amounting to Rs.15,70,429/-. To the said calculation of the decree holder, the judgment debtor filed counter along with a calculation sheet. It admitted that the decree holder was entitled to get a sum of Rs.2,79,199/- out of which Rs.63,059/- had already been paid to the decree holder. Out of the rest amount of Rs.2,16,141/- a sum of Rs.26,282/- was required to be deposited towards the Provident Fund in order to regularize the Employees' Provident Fund account of the decree holder. Therefore, the decree holder was entitled to a sum of Rs.1,89,859/-. The judgment debtor conceded to pay the said amount of Rs.1,89,859/- in ten equal installments, each installment being payable at an interval of two months. The decree holder being present in the court agreed to receive the said amount without foregoing his claim as per the decree. Since the judgment debtor did not pay the amount as per the decree, the executing court directed the decree holder to file next step for execution of the decree. The said order is under challenge in this civil revision by the judgment debtor.

3. While the learned counsel for the judgment debtor-petitioner submitted that during pendency of the civil revision, the petitioner has paid some amount in pursuance of the direction of this Court, he contended that there being no direction in the decree to pay interest on the amount claimed by the plaintiff, the decree holder is not entitled to interest on the said amount. The executing court, however, accepted the calculation sheet filed by the decree holder. Therefore, the same is liable to set aside as the executing court has no jurisdiction to go behind the decree.

4. Learned counsel for opposite party no.1-decree holder submitted that since the premature retirement order passed by the authority was void and illegal, the decree holder was entitled to uninterrupted service with full back wages. The decree holder calculated the back wages, CPF contribution, consequential benefits, arrear A.D.A, Surrender Leave Salary, interest on the aforesaid amount, house rent allowance, etc. and also the amount of gratuity and the interest payable on the gratuity. Accordingly, he filed a calculation sheet before the executing court and the judgment debtor also filed another calculation sheet before the executing court on 11.3.2003

wherein it was only shown that the decree holder was entitled to Rs.2,79,199/-. From the above calculation sheet filed by the judgment debtor, the executing court held that the calculation sheet filed by the decree holder was correct and the meager sum offered by the judgment debtor in his calculation sheet and that too to be paid in 20 monthly installments was illegal, perverse and unacceptable. Since the executing court passed a reasoned order, the same need not be interfered with.

5. After perusal of both the calculation sheets when this Court asked the petitioner as to how the figures mentioned in the calculation sheet are correct, he was not able to explain the same.

6. From the decree, it is crystal clear that the plaintiff is entitled to get all back wages and consequential service benefits till his retirement. After retirement, the plaintiff is also entitled to get the pensionary benefit. The post retirement benefits are benevolent in nature. No interpretation is possible where a benevolent provision would be defeated. After making the payment a condition of service, employer becomes a trustee in respect of the sum due and it has to assist the employee to get it as early as possible so that the employee utilizes the same in post retirement period.

7. Admittedly, both parties have filed their respective calculation sheets. Whether the said calculations are in accordance with the decree or not, is to be examined by the executing court.

8. Law is well settled that if the employer withholds pension amount then the employee is entitled to interest on the said amount and payment of interest on the pension amount is justified as the pensioner is being harassed by not receiving his pension after retirement. In the case of **O.P. Dutta** v. **Union of India** reported in **AIR 1987 SC 2257** the apex Court has held as under:

> "Normally, this Court, as a settled practice, has been making direction for payment of interest at 12% on delayed payment of pension. There is no reason for us to depart from that practice in the facts of the present case".

9. In the case of **State of Gujarat** v. **Umedbhai Patel** reported in **AIR 2001 SC 1109** the apex Court has held that interest on the withheld amount is to be granted by the court for the delay in making payment of the benefits due to the applicant.

10. In the present case, the decree holder has been deprived of the force of the decree since 1988, i.e., the year when the decree was passed by the trial court. The said decree was confirmed by this Court in the Second Appeal in the year 2002. Till date, the judgment debtor has not fulfilled the claims decreed in the suit. Therefore, without any further delay, this Court directs both the parties to appear before the executing court on 7.12.2009 and on the said date the judgment debtor will file a better calculation sheet towards

back wages of the decree holder till the date of his retirement with all consequential revised scale of pay and benefits and post retirement benefits thereof. Since the authority has not paid the dues in spite of the decree passed by this Court in the Second Appeal in the year 2002 till date, the retired employee is entitled to interest on the said amount of pension due to the negligence in payment by the employer.

11. Therefore, considering the above facts and circumstances of the case and the rate of interest given by the bank, this Court feels it proper to grant interest at the rate of 8% per annum for the delay in making payment of pension from the date of the decree till the payment is made and it is so directed.

12. With the above observation and direction, the civil revision is disposed of. No costs.

Revision disposed of .

2010 (I) ILR-CUT- 242

B.P.RAY,J.

VUNGARALA BERAIAH NAIDU -V- GAJANANDA AGRAWAL.*

DECEMBER 19,2009.

NEGOTIABLE INSTRUMENT ACT,1881 (ACT NO.26 OF 1881) – SEC.138.

Deemed service of notice – Explained -In the present case endorsement of the postal authority shows that the accused was intimated about the notice on two dates but deliberately returned the same with the connivance of the postal people – Held, accused managed to avoid service and therefore it can be construed as deemed service of notice – Hence this Court is not incliend to interfere with the order taking cognizance against the petitioner U/s.138 N.I.Act.

(Para 4,5,6)

Case laws Referred to:-

1.AIR 2003 SC 4689 K.R. : (India -V- Dr.G.Adinarayana).
2.1995 CRL.L.J. 3412 : (Gopa Debi Ozha -V- Sujit Paul).
3.2000 CRL. L.J. 1391 : (Suman Sethi -V- Ajay K.Churiwal & Anr.).
4.2009 AIR SCW 410 : (M/s.Harman Electronics(P) Ltd. & Anr.-V- M/s.National Panasonic India Ltd.).
5.III(2003)OCR 247 : (Suresh Kumar -V- Sasi).
6.2003 CRL. L.J. 2921 : (Rama Chandra Panigrahi -V-State of Orissa & Anr.).
7.1997(2) Crimes 707 : (A.Sudershan -V- Mannen (Shabir) & Anr.).
8.(2006)6 SCC 456 : (D.Vinod Shivappa -V-Nanda Belliappa).

For Petitioner – M/s.A.K.Mohanty & Associates.
For Opp.Party – M/s.N.Patra & Associates.

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*CRLMC.NO.1389 OF 2004. In the matter of an application under Section 482 of the Code of Criminal Procedure for quashing the order of cognizance dated 29.9.2003 passed against the petitioner in I.C.C.Case No.18 of 2003 by learned J.M.F.C.,Kantabanji.

B.P. RAY, J. The petitioner in this criminal misc. case invoking the inherent power U/s. 482 Cr.P.C. has prayed for quashing the order dated 29.9.2003 passed by the learned J.M.F.C., Kantabanji in I CC Case No. 18 of 2003 wherein cognizance for commission of offence U/s. 138 N.I. Act has been taken and process has been issued against him.

2. Brief facts of the case are as follows:-

On 14.3.2003, the accused-petitioner issued a cheque for Rs.40,000/- in favour of the complainant-opposite party against the goods supplied by him. The complainant presented the cheque, but the same got dishonored as the payment was stopped by the drawer and also on account of insufficient funds in the account. Later the complainant presented the cheque once again, but this time also the cheque could not be encashed as the accused issued stop payment intimation and there was no sufficient

funds in the account. The complainant after receipt of the intimation from the bank on 24.7.2003 issued the notice under Section 138, N.I. Act on 29.7.2003. Despite the notice the accused did not pay the amount, accordingly the present complaint was lodged.

3. The petitioner assails the impugned order of taking cognizance on the ground that there was no valid notice, therefore, the complaint is not maintainable. In support of this contention the petitioner places reliance on three registered letters issued by the complainant.

4. The petitioner is the Proprietor of M/s Kapi Poultries. The complainant issued three notices in three different addresses, namely, residential address; shop address and the factory address. So far as the letters issued in the residential address and shop address are concerned, it is submitted by the accused-petitioner that those are incorrect addresses. The notice was returned unserved, therefore, the same cannot be held to be sufficient. On verification of the postal cover it appears that the addresses given therein are no doubt in variation with that of the addresses which are claimed to be correct. The addresses furnished are to some extent in-complete and therefore, the letters returned unserved. As regards the letter sent in the Factory address, it is evident from the endorsement of the postal authority that the accused was intimated on two dates i.e.4.8.2003 and 5.8.2003 about the notice. Admittedly the accused was the proprietor of M/s. Kapi Poultries. It is also not in dispute that the letter had reached the said premises. If the postal authority has intimated about the registered letter on two occasions in the address of the factory/business premises, it cannot be said that the accused had no knowledge about the letter. But curiously enough the said letter was also returned unserved even after intimation to the addressee. The dubious conduct of the postal authority speaks volume. The addressee, who had knowledge about the letter/notice, deliberately avoided to receive the same and with the connivance of postal authority could manage to return the letter and thereby deprived the complainant of taking recourse to legal proceeding. If it is construed as non-service of notice, then it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to keep himself away from the legal consequence.

5. Several decisions are cited by the petitioner in support of his contention. The decisions reported in AIR 2003 SC 4689 K.R., **Indira v. Dr. G. Adinarayana**; 1995 CRI. L.J. 3412, **Gopa Debi Ozha v. Sujit Paul**; 2000 CRI. L.J. 1391, **Suman Sethi v. Ajay K. Churiwal and another**; speak of the contents of the demand notice. It has been held that in the notice there must be specific demand regarding payment of the amount covered under the cheque. Unless the notice contains the demand of cheque amount the same would be invalid. That is not the question in the case at hand and

therefore, the decisions are not applicable. In the case of **M/s. Harman Electronics (P) Ltd. & Anr. V. M/s. National Panasonic India Ltd** reported in 2009 AIR SCW 410, the primary question arose regarding the territorial jurisdiction of the Court. The Hon'ble apex Court has further held that only issuance of notice would not be sufficient unless the same is communicated to the accused. There is no dispute regarding the said proposition. To constitute the offence, the notice must be served on the accused. In certain situation there would be deemed service. In the present case the accused managed to avoid service and therefore, it can be construed as deemed service. In the decisions reported in III (2003) CCR 247, **Suresh Kumar v. Sasi** and 2003 CRI. L.J. 2921 **Rama Chandra Panigrahi v. Satate of Orissa and anr.,** it has been held that if the notice is sent to a person in wrong address, that service of notice shall not be deemed to have been effected. When one of the letters has reached the addressee, it cannot be said that the address was wrong. There may be some deficiency, but when with that description the letter has reached the destination, it should be treated as correct address. The apex Court judgment reported in 2009 (5) Supreme 320, **Jugesh Sehgal v. Shamsher Singh Gogi** held that when all the ingredients required to constitute the offence are fulfilled, the person who has drawn the cheque can be deemed to have committed the offence. One of the requisite ingredients is service of notice. It has been further held that if one of the ingredients is not satisfied continuation of further proceeding would be abuse of the process of the Court. There is no controversy over the principle laid down by the Hon'ble Court. The factual matrix of that case is not akin to the present one, therefore, the same has no application. In a decision reported in 1997 (2) Crimes 707 (**A. Sudershan v. Mannen (Shabir) and another),** the Andhra Pradesh High Court has held that demand notice returned with postal endorsement not found for 7 continuous days, therefore, there was no service of notice on the drawer. This conclusion cannot be accepted in view of the decision of the Supreme Court reported in (2006) 6 SCC 456 (**D. Vinod Shivappa v. Nanda Belliappa)**.

6. Even if it is found that there was some irregularity in service of notice the same would not be sufficient to quash the proceeding at the threshold. Whether there was valid service or not is a question of fact which can be proved in the trial by adducing evidence on that score. The accused can prove that the address was not correct. The apex Court in the case of D. Vinod Shivappa (supra) has not appreciated quashing of the proceeding in exercise of power u/s.482 Cr.P.C. when there is factual dispute and the same can be determined in the trial. The other courses are also open for the accused, who can compound the offence by paying the amount.

For the reasons aforesaid, I am not inclined to interfere with the order taking cognizance and accordingly this application is dismissed.

2010 (I) ILR-CUT- 245

B.P.RAY,J.

MANOJ KUMAR AGARWAL -V- STATE OF ORISSA.*

DECEMBER 19,2009.

PENAL CODE, 1860 (ACT NO.45 OF 1860) – SEC.304-A.

Unless the person does any rash or negligent act not amounting to culpable homicide, which causes death of any person the provisions of Section 304-A would not be attracted.

In this case petitioner is the owner of the rice mill and deceased Aparna Sethy was his employee and she died when her saree dragged along with the belt of the rice mill – Held, petitioner had not done any rash or negligent act which was responsible for the death of the deceased – Prosecution failed to establish a case U/s.304-A against the petitioner. (Para 5)

Case law Referred to-:

(2005)6 SCC 1 : (Jacob Mathew -V-State of Punjab & Anr.)

For Petitioner – Mr.S.P.Sarangi & Associates.

For Opp.Party – Addl.Govt.Advocate.

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*CRLMC. NO.1611 OF 2008.In the matter of an application U/s.482 of the Cr.P.C. to quash the F.I.R. registered as Boudh P.S.Case No.65 of 2008 corresponding to G.R.Case No.153 of 2008 pending the Court of learned S.D.J.M.,BOUDH.

B.P. RAY, J. In this application U/s. 482 of the Code of Criminal Procedure, the petitioner seeks to quash the F.I.R. registered in Boudh P.S. Case No. 65 dated 18.5.2008 which corresponds to G.R. Case No. 153 of 2008 pending in the file of the S.D.J.M., Boudh. The case has been registered for the offence U/ss. 287 and 304-A of I.P.C. The F.I.R. has been enclosed as Annexure-1 to the application.

2. The prosecution case as revealed from the F.I.R. is that the petitioner is the owner of a rice mill located in village Biswanathpur. The deceased Apurna Sethy was working in the rice mill of the petitioner. While the deceased was working in the rice mill of the petitioner on 22.3.2004, her saree came in contact with the belt of the rice mill for which the deceased was dragged with the belt and subsequently died on the spot. It appears that an U.D. case was registered which was enquired into and the dead body was sent for post mortem examination. The doctor, who conducted the post mortem examination, opined that the cause of death of the deceased was due to strangulation on neck either homicidal or accidental strangulation by means of saree or a cloth. The informant, who was A.S.I. of Police while enquiring into the case, examined two witnesses. The witnesses who were examined by the informant clearly stated as would appear from the F.I.R. that the deceased Apurna Sethy while working in the rice mill of the petitioner came in contact with conveyor belt of the rice mill as a result, the

saree was dragged along with the belt and she died at the spot due to strangulation on her neck. On the basis of such result in the U.D. case, the A.S.I. of Police lodged the F.I.R. in question under Annexure-1 alleging that the occurrence took place due to coming in contact with the machinery of the rice mill of the petitioner for which the petitioner was liable for the offence U/ss. 287/304-A I.P.C.

3. The learned counsel appearing for the petitioner raised the contentions in support the suggestion for quashing the F.I.R. under Annexure-1. The first submission of the learned counsel was that the undisputed facts disclosed in the F.I.R. do not make out a case of any willful or deliberate act on the part of the petitioner much less any rash or negligent act to attract the mischief of Section 304-A of I.P.C. The second submission of the learned counsel was that the occurrence having taken place on 22.3.2004 and the F.I.R. having been drawn up on 18.5.2008 inasmuch as no charge sheet having been filed, the prosecution is clearly barred U/s. 468 of the Code of Criminal Procedure. The learned counsel appearing for the State submits that the prosecution case as revealed from the F.I.R. clearly makes out a case U/s. 304-A of I.P.C. and the case is not barred by law of limitation.

4. The rival contentions require careful examination. The undisputed facts are that the deceased was employed in the rice mill of the petitioner and her saree came in contact with the conveyor belt of the rice mill in course of employment on 22.3.2004. Since the saree of the deceased was dragged with the belt, the deceased died at the spot. There is no dispute to these factual aspects. Whether these facts would constitute the offence within the meaning of Section 304-A of I.P.C., for which it is necessary to notice the provisions of Section 304-A I.P.C. Section 304-A I.P.C. is as follows:-

> "Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Unless the person does any rash or negligent act not amounting to culpable homicide, which causes death of any person, the provisions of Section 304-A would not be attracted. The facts disclosed in the F.I.R. do not show that the petitioner had done any rash or negligent act which was responsible for the death of deceased Apurna Sethy. In other words, there was no willful or deliberate act on the part of the petitioner which caused the death of the deceased. The prosecution is required to prove the rash or negligent acts on the part of the petitioner, so as to prosecute him for the offence U/s. 304-A I.P.C.

5. On careful perusal of the facts disclosed in the F.I.R., this Court fails to find out any act on the part of the petitioner which can be treated as rash or negligent act on his part which caused the death of the deceased. In the

present case the death of the deceased was not the direct result of any rash or negligent act of the petitioner inasmuch as the act complained of must be the proximate and efficient cause without intervention of another's negligence. Merely because the deceased was employed in the rice mill of the petitioner, the same can never be termed as rash and negligent act of the petitioner. In this connection learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Jacob Mathew V. State of Punjab and another,** (2005) 6 SCC 1. In such view of the matter, I have no hesitation to hold that the allegation as set out in the F.I.R. hardly attracts the mischief of Section 304-A I.P.C. So far as the offence U/s. 287 I.P.C. is concerned, the F.I.R. is conspicuously silent that the petitioner had done any negligent act with any machinery so as to endanger human life. Therefore, the offence U/s. 287 I.P.C. is also not attracted. As such the conclusion is irresistible that the prosecution has miserably failed to prima facie establish a case u/ss. 287/304-A I.P.C. against the petitioner.

6. In view of the aforesaid conclusion with regard to the first submission of the learned counsel for the petitioner, it is not necessary to examine the correctness of the second submission of the learned counsel for the petitioner.

7. In view of the above, the F.I.R. under Annexure-1 registered against the petitioner in Boudh P.S. Case No. 65 dated 18.5.2008 corresponding to G.R. Case No. 153 of 2008 pending in the court of S.D.J.M., Boudh is quashed.

Accordingly, the CRLMC is allowed.

2010 (I) ILR-CUT- 248

S.C.PARIJA,J.

THE D.M.,ORIENTAL INSURANCE CO.LTD.-V-ARATI MISHRA & ANR.,D.M.,O.I.C.LTD. -V- ASHOK KU. SATPATHY& ANR., D.M.,O.I.C.LTD.-V-SAROJINI SATPATHY & ORS. & D.M.,O.I.C.LTD. -V- PABITRA MISHRA & ORS.*

JULY 10,2009.

MOTOR VEHICLES ACT, 1988 (ACT NO.59 OF 1988) – SEC.147.

"Act only" Policy i.e. the third party Policy issued in respect of the offending jeep which is a private vehicle – Whether the Policy would cover the risk of death or injury to gratuitous passengers who are not carried for hire or reward – No.

Held, finding of the Tribunal holding Insurance Company liable to pay compensation amount is set aside – However it is open for the claimants to recover the awarded compensation from the owner of the vehicle in accordance with law. (Para 23)

Case laws Referred to:-

1.1977 SC 1735 : (Pushpabai Purshottam Udesh & Ors.-V- M/s.Ranjit Ginning & Pressing Co.(P)Ltd. & Anr.).
2.(2001) 8 SCC 748 : (Dr.T.V.Jose -V-Chacko P.M.@Thankachan & Ors.)
3.AIR 2002 SC 651 : (New India Assurance Co.Ltd.-V-C.M.Jaya & Ors.)
4.(1995) 2 SCC 539 : (New India Assurance Co.Ltd. -V-Shanti Bai & Ors.)
5.(1998)3 SCC 744 : (Amrit Lal Sood -V- Kaushalya Devi Thapar).
6.AIR 2003 SC 607 : (New India Insurance Co.Ltd.-V-Asha Rani & Ors.).
7.AIR 2004 SC 1340 : (National Insurance Co.Ltd.-V-Baljit Kaur).
8.AIR 2005 SC 2337 : (National Insurance Co.Ltd.-V-Prambai Patel & Ors.).
9.AIR 2006 SC 1576 : (United India Insurance Co.Ltd.Shimla -V-Tilak Singh & Ors.)
10.AIR 2008 SC 272 : (Oriental Insurance Co.Ltd.-V-Sudhakaran K.V.& Ors.).
11.AIR 2009 SC 626 : (General Manager,United India Insurance Co.Ltd.-V-Sadananda Mukhi & Ors.).

For Appellant – M/s.G.P.Dutta, A.K.Jena.
For Respondent – M/s.A.S.Nandy, T.Sinha & M.P.Tripathy.

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*MISC.APPEAL NOS.187 TO 192 OF 2001. In the matter of appeals under Section 197(1) of the M.V.Act.

S.C. PARIJA, J. All these appeals by the Insurance Company are directed against the common judgment/award dated 30.09.2000 passed by the First Motor Accident Claims Tribunal, Dhenkanal, in MAC No.159 of 1994, MAC No.171 of 1994, MAC No.157 of 1994, MAC No.160 of 1994, MAC No.173 of 1994 and MAC No.155 of 1994, which arises out of the self same accident, awarding compensation to the claimants and directing the Insurance Company to pay the same.

2. M.A. No.187 of 2001 relates to MAC No.159 of 1994, M.A. No.188 of 2001 relates to MAC No.171 of 1994, M.A. No.189 of 2001 relates to MAC No.157 of 1994, M.A. No.190 of 2001 relates to MAC No.160 of 1994, M.A. No.191 of 2001 relates to MAC No.173 of 1994 and M.A. No.192 of 2001 relates to MAC No.155 of 1994.

3. The facts common to all the above appeals are that on 03.03.1994, the deceased Jema alias Padmalaya Mishra and Sureswar Satpathy and other injured persons were travelling in a jeep bearing no.OSS-4841 from Puri and at about 3.30 P.M. near the Octroi check gate on N.H.42, at the outskirts of Dhenkanal town, the vehicle driven in a rash and negligent manner, went to the extreme right side of the road and dashed against a tree and overturned. As a result of such accident, two occupants died and other passengers suffered injuries.

4. The owner of the offending jeep appeared and filed written statement before the learned Tribunal admitting that he was the owner of the jeep no.OSS-4841 and claimed that the vehicle stood insured with the present appellant, under a valid policy of insurance. The owner further pleaded that at the relevant point of time the vehicle was not let out for hire and that the deceased persons as well as the injured persons were travelling in the vehicle as a gratuitous passengers, without any payment, due to his friendly accommodation. It was further pleaded by the owner of the vehicle that the accident took place not due to any rash and negligent act by the driver but due to reasons beyond the control of the driver.

5. The Insurance Company in its written statement while denying the claim of the claimants, pleaded that as the offending vehicle (jeep) was carrying more than 10 passengers on hire at the time of the accident, the same was in violation of the policy condition and the Insurance Company is not liable to pay the compensation amount.

6. Learned Tribunal on the basis of the evidence on record, including the FIR (Ext.1) and Charge Sheet (Ext.2), came to hold that the accident took place due to rash and negligent driving by the driver of the offending jeep, for which, the police after investigation, has filed charge sheet against the accused driver under Sections 279/337/338/304-A I.P.C.

7. Coming to the liability to pay the compensation amount, the Insurance Company pleaded that the offending vehicle (jeep) had been let out on hire at the time of accident and the same was carrying more passengers than the permitted seating capacity, which was in violation of the policy condition and therefore the Insurance Company is not liable to indemnify the owner. Learned Tribunal on the basis of the evidence on record and the plea of the owner of the vehicle, taken in the written statement, came to hold that the deceased persons as well as the injured persons were travelling in the offending jeep as gratuitous passengers and that carrying of excess

passengers was not in violation of policy condition as per Section 149(2) of the Motor Vehicles Act, 1988 (for short 'the M.V.Act') and therefore the Insurance Company is liable to pay the compensation amount to the claimants.

8. Learned counsel for the Insurance Company has raised the sole contention that as the learned Tribunal has come to find that all the persons travelling in the offending jeep, at the time of the accident, were travelling as gratuitous passengers and the insurance policy issued in respect of the said vehicle was an 'Act only' policy, no liability could have been saddled on the Insurance Company. It has been submitted that the words 'Act only' mentioned in the policy (Ext.A) clearly indicate that the liability of the Insurance Company was not an unlimited one but that which was mandatorily required under the M.V. Act so as to cover the liability of 'third party' only. In this regard, it is submitted that Section 147 of the M.V. Act does not cover the risk of gratuitous passengers carried in a private vehicle and therefore the carriage of such gratuitous passengers in the offending jeep was clearly in violation of the terms and conditions of the 'Act only' policy on the part of the owner and consequently no liability to pay the compensation amount can be fastened on the Insurance Company. In such cases, even the recovery rights cannot be given as the Insurance Company is completely absolved from any liability to pay the compensation amount.

9. Learned counsel appearing for the claimants in all the appeals submits that the 'Act only' policy does cover the liability of occupants of the offending jeep, who were admittedly travelling as gratuitous passengers and not for hire or reward and therefore the Insurance Company cannot be absolved of its liability to pay the compensation amount. It is further submitted that as the occupants of the offending jeep, which was insured as a private car, stand in the position of a 'third party', the insurer is liable to pay the compensation amount awarded.

10. The insurance policy (Ext.A) clearly shows that the same is an 'Act only' policy issued in respect of the offending jeep no.OSS-4841 as a private vehicle and there is no mention in the said policy with regard to any coverage of the occupants of the jeep and an amount of Rs.305/- only has been paid by the owner towards insurance premium.

11. The sole question which requires consideration in all the above appeals is whether a 'Act only' policy, which is in the nature of a statutory policy under Section 147 of the M.V. Act intended to cover the risk to life or damage to properties of the third parties, would also cover the risk of death or injury to a gratuitous passenger carried in a private vehicle.

12. The issue involved in the present appeal is no more res integra as the Apex Court has taken the view that Section 147 of the M.V. Act does not

envisage coverage of risk of gratuitous passenger and therefore, to carry a gratuitous passenger is clearly in violation of terms and conditions of the policy on the part of the owner, and consequently no liability to pay the compensation can be fastened on the Insurance Company. As back in the year 1977, the Supreme Court while considering the scope of statutory insurance under Section 95 of the M.V. Act, 1939, came to hold that the said provision required that the policy of insurance must be a policy insuring the insured against any liability incurred by him in respect of death or bodily injury to a third party and rejected the contention that the word 'third party' were wide enough to cover all persons except the insured and the insurer. Hon'ble Court accordingly held that it is not required that a policy of insurance should cover risk to the passengers who are not carried for hire or reward and therefore under Section 95 the risk to a passenger in a vehicle who is not carried for hire or reward is not required to be insured and the insurance company was held not liable under the requirements of the Motor Vehicles Act, 1939 – see ***Pushpabai Purshottam Udesh and others - vrs.- M/s. Ranjit Ginning & Pressing Co. (P) Ltd. and another***, AIR 1977 SC 1735.

13. In ***Dr. T.V. Jose v. Chacko P.M. alias Thankachan and others***, (2001) 8 SCC 748, the Supreme Court had an occasion to survey the law with regard to the liability of the Insurance Company in respect of gratuitous passengers. After referring to a number of decisions, the Hon'ble Court observed that the law on this subject is clear, a third-party policy does not cover the liability to gratuitous passengers who are not carried for hire or reward. The Insurance Company was held not liable to indemnify the owner of the vehicle.

14. A Constitution Bench of the Supreme Court in ***New India Assurance Co. Ltd. –vrs.- C.M. Jaya and others,*** AIR 2002 SC 651, while interpreting the provisions of Section 95(2) of the Motor Vehicles Act, 1939, held as under : "The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible."

15. The Constitution Bench also referred to earlier decisions rendered in ***New India Assurance Co. Ltd. v. Shanti Bai and others,*** (1995) 2 SCC 539 ***and Amrit Lal Sood v. Kaushalya Devi Thapar,*** (1998) 3 SCC 744

and observed that in case of an insurance policy not taking any higher liability by accepting a higher premium, the liability of the Insurance Company is neither unlimited nor higher than the statutory liability fixed under Section 95(2) of the Motor Vehicles Act, 1939. It was further observed that it is open to the insured to make payment of additional higher premium and get higher risk covered in respect of third party also. But in the absence of any such clause in the insurance policy, the liability of the insurer cannot be unlimited in respect of third party and it is limited only to the statutory liability.

16. In ***New India Insurance Co. Ltd. -vrs.- Asha Rani and others***, AIR2003 SC 607, the Supreme Court observed as under :

> Section 147 of 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's Compensation Act. It does speak of any passenger in a 'good carriage.
>
> Furthermore, sub-clauses (i) of Clause (b) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place."

17. It is now well settled that the term 'any person' envisaged under Section 147 of the M.V. Act does not include any gratuitous passenger, as has been held in ***National Insurance Co. Ltd. –vrs.. Baljit Kaur***, AIR 2004 SC 1340.

18. In the case of ***National Insurance Co. Ltd. -vrs.- Prembai Patel and others,*** AIR 2005 SC 2337, the Supreme Court while considering the extent of liability of the Insurance Company under an 'Act only' policy, took note of Constitution Bench decision in C.M. Jaya case (supra) and proceeded to hold as under :

> **"**Though the aforesaid decision has been rendered on Section 95(2) of the Motor Vehicles Act, 1939 but the principle underlying therein will be fully applicable here also. It is thus clear that in case the owner of the vehicle wants the liability of the insurance company in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section

147(1)(b) should not be restricted to that under the Workmen's Act but should be more or unlimited, he must take such a policy by making payment of extra premium and the policy should also contain a clause to that effect. However, where the policy mentions "a policy for Act Liability" or "Act Liability", the liability of the insurance company qua the employees as aforesaid would not be unlimited but would be limited to that arising under the Workmen's Act."

19. In the case of ***United India Insurance Co. Ltd., Shimla -vrs.- Tilak Singh and others***, AIR 2006 SC 1576, the Supreme Court while considering the liability of the Insurance Company under an 'Act only' policy vis-à-vis the risk of gratuitous passenger carried in a private vehicle, affirmed the view taken in Asha Rani case (supra) and observed as under :

"In our view, although the observations made in Asha Rani's case (supra) were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant-insurance company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to gratuitous passengers."

20. In the case of ***Oriental Insurance Co. Ltd. - vrs. - Sudhakaran K. V. and others,*** AIR 2008 SC 2729, the Supreme Court while considering the question whether an 'Act only' policy would cover the risk of the pillion rider of a scooter, proceeded to hold that such a contract of insurance covered the risk of a third party and not that of the owner or pillion rider of a two wheeler. The Hon'ble Court held as follows :

" The law which emerges from the said decisions, is : (i) the liability of the insurance company in a case of this nature is not extended to a pillion rider of the motor vehicle unless the requisite amount of premium is paid for covering his/her risk; (ii) the legal obligation arising under Section 147 of the Act cannot be extended to an injury or death of the owner of vehicle or the pillion rider; (iii) the pillion rider in a two wheeler was not to be treated as a third party when the accident has taken place owing to rash and negligent riding of the scooter and not on the part of the driver of another vehicle."

21. In the case of ***General Manager, United India Insurance Co. Ltd. - vrs.- M. Laxmi and others,*** AIR 2009 SC 626, the Supreme Court while considering a similar question as to the extent of liability of the Insurance Company under an 'Act only' policy in respect of a pillion rider in a scooter,

held that such a policy does not cover the risk to a pillion passenger and only a 'Comprehensive' policy would cover such a risk.

22. In the case of ***New India Assurance Company Ltd. -vrs.- Sadanand Mukhi and others,*** 2009 (2) SCC 417, the Supreme Court held as under :

> "Contract of insurance of motor vehicle is governed by the provisions of the Insurance Act. The terms of the policy as also the quantum of premium payable for insuring the vehicle in question depends not only upon the carrying capacity of the vehicle but also on the purpose for which the same was being used and the extent of the risk covered thereby. By taking an 'act policy', the owner of a vehicle fulfils his statutory obligation as contained in Section 147 of the Act. The liability of the insurer is either statutory or contractual. If it is contractual its liability extends to the risk covered by the policy of insurance. If additional risks are sought to be covered, additional premium has to be paid. If the contention of the learned Counsel is to be accepted, then to a large extent, the provisions of the Insurance Act becomes otiose. By reason of such an interpretation the insurer would be liable to cover risk of not only a third party but also others who would not otherwise come within the purview thereof. It is one thing to say that the life is uncertain and the same is required to be covered, but it is another thing to say that we must read a statute so as to grant relief to a person not contemplated by the Act. It is not for the Court, unless a statute is found to be unconstitutional, to consider the rationality thereof. Even otherwise the provisions of the Act read with the provisions of the Insurance Act appear to be wholly rational."

23. Applying the principles of law as discussed above to the facts of the present case and keeping in view the fact that the two deceased persons as well as the injured persons were travelling in the offending jeep as gratuitous passengers and the policy of insurance issued in respect of the said vehicle was an 'Act only' policy, no liability can be fastened on the Insurance Company and the liability to pay the compensation amount awarded rests solely on the owner of the vehicle. The findings of the learned Tribunal holding the Insurance Company liable to pay the compensation amount and directing them to pay the same is accordingly set aside. It is open for the claimants to recover the awarded compensation amount from the owner of the vehicle, in accordance with law. The impugned award stands modified to the said extent.

The appeals are accordingly allowed.

2010 (I) ILR-CUT- 255

B.K.PATEL,J.

UNITED INDIA INSURANCE CO.LTD.BBSR.-V-ULLASH CHANDRA MOHARANA & ORS.*

DECEMBER 22,2009.

CIVIL PROCEDURE CODE, 1908 (ACT NO.5 OF 1908) – ORDER 6, RULE 2 r/w SEC.147 & 149 M.V.ACT 1988.

Pleadings – Owner-respondent No.7 pleaded that he paid money and submitted proposal for policy to the Insurance Company on Dt.15.03.1994 – Accident occurred at 10.30 A M Dt.16.3.1994 – Policy issued at 2.40 P.M. on Dt.16.3.1994 – Money receipt towards the policy amount paid by the owner issued on 17.3.1994 – Despite the above the Insurance Company did not file Addl.W.S. denying liability on the ground that the offending vehicle was not insured at the time of accident.

There was no specific pleading taken by the Insurance Company that Insurance Policy issued to respondent No.7 was taken at 2.40 P.M. on 16.3.1994 for which Insurance Company was not liable for the accident which took place at 10.30 A.M. on 16.3.1994 – Learned Tribunal rightly held the Insurance Company liable to satisfy the award. (Para 15)

Case laws Referred to:-

1.2000(I)TAC.3 (SC) : (New India Assurance Co.Ltd.-V-Smt.Sita Baik & Ors.)
2.2000(3)TAC 229(SC) : (New India Assucance Co.Ltd.-V-Rakesh Talwar).
3.2007(3)TAC 19(SC) : (National Insurance Co.Ltd.-V-Sobina Iakai & Ors.).
4.2003(I)OLR 644 : (Divisional Manager,New India Assurance Co. Ltd . -V- Ushanta Kumar Choudhury @ Usmanta & Anr.).
5.1999(I)TAC.328(Ori.): (M.A.Razak-V-United India Insurance Co.Ltd.& Ors).
6.2000(3)TAC 460(Cl.) : (Sripati Charan Mondal & Anr.-V-Oriental Insurance Co.Ltd.).
7.1994(I)TAC.205 : (United India Insurance Co.-V-Sashiprava Swain & Anr.).
8.AIR 1986 Delhi 94 : (Mahipalpur Co-op.Society Ltd.-V-Smt.Prabhati & Ors.).
9.AIR 1994 Gauhati 41 : (Smt.Jhulan Rani Saha-V-The National Insurance Co. & Ors.).
10.AIR 1997 A.P.53 : (Habeeb Khan & Ors.-V-Valasula Devi & Ors.).
11.1998(2) TAC.(Ori.) : (M/s.United India Insurance Co.Ltd.-V-Abada Khatun & Ors.).

For Appellant – M/s.A.K.Mohanty, M.C.Nayak & D.C.Dey.
For Respondents – M/s.S.K.Sanganeria, P.C.Pattnaik, A.K.Sahani. (for respondents 1 to 5)

*MISC.APPEAL NO.168 OF 2001.From the judgment dated 27.10.2000 passed by Shri P.C.Mishra, Member, 3rd Motor Accident Claims Tribunal, Bhubaneswar in Misc.Case No.334 of 1994.

B.K.PATEL, J. United India Insurance Company (for short 'the Insurance Company') is in appeal against the order dated 27.10.2000 under section 166 of the Motor Vehicles Act (for short, 'the Act') passed by the Member, 3rd Motor Accident Claims Tribunal, Bhubaneswar in Misc. Case No.334 of 1994 awarding compensation of Rs.1,49,000/- with interest @ 9% per annum from the date of filing of claim application i.e. 20.6.1994 till the date of passing of the award within two months failing which the interest would be payable till date of payment in favour of the claimants-respondents 1 to 5 payable by the Insurance Company, on account of death of deceased Kishore Kumar Maharana in a motor vehicle accident involving the offending vehicle belonging to the respondent no.7. Respondent no.6 was the previous owner of the offending vehicle. On consent the matter was taken up for disposal at the stage of admission.

2. The accident occurred at 10.30 A.M. on 16.3.1994 when the offending vehicle dashed against the scooter which the deceased was driving. It was categorically pleaded in the claim application that the offending vehicle bearing registration No.ORF-4598 was insured with the appellant Insurance Company under Cover Note No.264117 during the period of the accident.

3. Respondent no.6 was set exparte. Respondent no.7 filed written statement admitting to have purchased the vehicle from respondent no.6. It was also admitted by him that the death of the deceased occurred due to the accident involving the offending vehicle belonging to him. With regard to the insurance of the offending vehicle with the appellant Insurance Company it was pleaded as follows:

> "10. That, the vehicle of this O.P. has validly insured with O.P.No.3 i.e. United India Insurance Co.Ltd., Mancheswar Branch, Cuttack Puri Road, Bhubaneswar.
>
> 11. That, this O.P. and O.P.No.1 in whose name R.C.Book stands had gone to the said insurance branch office on 14.3.94 to discuss with its authority regarding the insurance of the vehicle. After discussion, the authority tell them to come on 15.3.94 with the vehicle and money. So the O.P.No.2 and this O.P. again went to the said Branch Office on 15.3.94 with vehicle and money(cash) and gave the money to the said Insurance Company and O.P.No.1 signed proposal form (paper for contract).
>
> 12. That, after receiving money and physical verification of the vehicle by the said insurance authority, assured these O.Ps. for insurance of the vehicle and told them to come after few days to take the insurance papers etc. as the process takes some days.

13. That, after assurance given by the said Insurance Authority the present O.P. allow its vehicle to run the vehicle on the morning of 16.3.94.

14. That, due to ill fate of the O.P. the vehicle met an accident on 16.3.94 at about 10.30 A.M.

15. That, after the accident the local police seized the vehicle immediately and ask this O.P. for production of papers of the vehicle.

16. That, as this O.P. has not received the insurance policy from the said Insurance Company, so he went to the Insurance Company on the same date of accident for the insurance policy and informed the said authority regarding the accident and for urgent need of the insurance policy, but the said company did not hand over the policy or cover note or money receipt to this O.P. and again said to come on 17.3.94. So this O.P. again came to the said insurance company on 17.3.94 and took the money receipt and cover note from the insurance company.

17. That, the time mentioned in the cover note by the said Insurance Company to avoid its liability which is not sustainable in the eye of law.

18. That, as the vehicle has validly insured with the O.P.No.3 by signing proposal form covering the date of accident. Hence, O.P.No.3 is alone liable to pay the compensation in this case."*(sic)*

4. In the written statement filed by the Insurance Company the claim was resisted mainly on the ground that the claimants had not produced any document or evidence relating to rash and negligence on the part of the driver of the offending vehicle, age and income of the deceased and registration etc. of the offending vehicle. As regards claimants' assertion of the offending vehicle to have been insured with the appellant Insurance Company it was pleaded at paragraph 10:

> "That the applicants have not furnished the details of the insurance policy issued in favour of the alleged vehicle belonging to the O.P.No.1 bearing Registration No.ORF-4598(Matadoor) covering all risks and in absence of the said policy the involvement of this O.P.no.3 in the compensation application is not maintainable and is liable to be dismissed with costs."

5. In order to substantiate their respective assertions claimants examined two witnesses including deceased's father as P.W.1 and relied upon certified copies of documents marked Exts.1 to 5 which are certified copies of documents obtained from the criminal case record instituted in connection with the accident.

The Insurance Company examined Manager of its Mancheswar Branch as O.P.W.1 and also relied upon Exts. A to C which are office copies

of money receipt dated 17.3.94, Cover Note dated 16.3.94 and policy dated 17.3.94 issued in favour of respondentno.7.

No evidence was adduced on behalf of respondent no.7.

On consideration of materials and evidence on record, learned Tribunal passed the impugned award holding the Insurance Company to be liable to pay compensation to the claimants.

6. In support of the appeal, upon reference to the evidence of O.P.W.1 and the contents of copies of Cover Note Ext.B and Insurance Policy Ext.C, it was submitted by the learned counsel for the appellant Insurance Company that the Cover Note and the Insurance Policy were issued to the respondent no.7 in respect of the offending vehicle covering risk w.e.f. 2.40 P.M. on 16.3.94. On the basis of such submission it was argued that the accident having admittedly occurred at 10.30 A.M. on 16.3.1994, it is obvious that the insurance policy was taken after the accident for which the Insurance Company is not liable to be saddled with any liability arising out of the accident. In this context, learned counsel for the Insurance Company placed reliance on the decisions of the Supreme Court in ***New India Assurance Co. Ltd. –v- Smt. Sita Baik and others*** : 2000(I) T.A.C. 3(SC), ***New India Assurance Co. Ltd. –v- Rakesh Talwar*** : 2000(3) T.A.C. 229 (SC) and ***National Insurance Co.Ltd. –v- Sobina Iakai and others***: 2007(3) T.A.C.19(SC) and of this Court in ***Divisional Manager, New India Assurance Co.Ltd. –v- Ushanta Kumar Choudhury @Usmanta and another***: 2003(I) OLR 644.

7. In reply, learned counsel appearing for the claimants submitted that the learned Tribunal has rightly observed in the impugned award that the Insurance Company has not pleaded in the written statement regarding non-coverage of the policy issued to the respondent no.7 in respect of the offending vehicle at the time of accident. It was also submitted that the respondent no.7 categorically pleaded in his written statement that the proposal for the insurance policy was submitted and the policy amount was paid by him on 15.3.94, but the Insurance Company deliberately issued Cover Note and policy w.e.f. 2.40 P.M. on 16.3.94 after knowing that the vehicle had met with an accident at 10.30 A.M. on that date. Despite such averments in the written statement the Insurance Company did not file additional written statement denying liability on the ground that the offending vehicle was not insured at the time of accident. It was argued that in absence of specific pleading, the defence of non-coverage set up at a belated stage by adducing evidence without backed by pleading is liable to be ignored. Learned counsel for the claimants relied upon decisions in ***M.A. Razak -v- United India Insurance Co.Ltd. and others***: 1999(I) T.A.C.328(Ori.), ***Sripati Charan Mondal and another –v- Oriental Insurance Co.Ltd***: 2000(3) T.A.C.460(Cal.); ***United India Insurance***

Company -v- Sashiprava Swain and another : 1994(I) T.A.C.205; ***Mahipalpur Co-op. Society Ltd. –v- Smt. Prabhati and others*** : AIR 1986 Delhi 94; ***Smt. Jhulan Rani Saha –v- The National Insurance Company and others***: AIR 1994 Gauhati 41; ***Habeeb Khan and others –v- Valasula Devi and others*** : AIR 1997 A.P. 53; and ***M/s United India Insurance Co. Ltd. –v- Abada Khatun and others*** : 1998(2) T.A.C.(Ori.).

8. Ext.B the carbon copy of Cover Note in respect of the offending vehicle bears the date and time of "16.3.94" "02.40 PM" respectively. In the body of Ext.B also there is mention of time as "02.40 PM" and the dates "16th March, 1994" and "15th March, 1995". In Ext.C the copy of insurance policy period of insurance has been mentioned from 02.40 PM on 16th March 1994 to midnight on 15th March 1995. The date of issue of insurance policy has been mentioned as 17th March, 1994. It further appears that Ext.A the money receipt towards policy amount paid by respondent no.7 was issued on 17.3.94. Undisputedly, in the written statement filed by appellant-Insurance Company no plea was taken to the effect that insurance policy issued to respondent no.7 was taken at 02.40 PM on 16.3.94 for which Insurance Company was not liable to cover liability arising out of the accident which took place at 10.30 AM on 16.3.94.

9. The following propositions with regard to coverage of insurance policy have been approved by the Hon'ble Supreme Court in ***National Insurance Co.Ltd. –v- Sobina lakai and others*** (supra):

> "(i) If time is mentioned in the insurance policy or cover-note, the effectiveness of the policy would start from that time and date and not from an earlier point of time;
>
> (ii) If the accident takes place on that very date before the time which is mentioned in the insurance policy, the insurer will not be liable to indemnify the insured;
>
> (iii) If the time is not mentioned in the insurance policy, it would commence from the date which means midnight and in case the accident occurred on the date of taking the policy, the insurer will be liable to meet the liability of the insured under the award."

Law is well settled that where a specific time has been mentioned in the insurance policy, the insurance will be effective only for the time specifically mentioned in the insurance policy and not from the previous midnight and in such a case the owner is liable for compensation. There is no dispute to the propositions as laid down in the decisions cited by the learned counsel for the Insurance Company.

10. However, claimants' stand is that in the absence of any plea, much less specific plea, in the written statement filed by the Insurance Company, in spite of the fact that respondent no. 7 the owner of the offending vehicle

pleaded in his written statement that policy amount and proposal for insurance policy was received by the Insurance Company on 15.3.94, evidence, oral and documentary, adduced on behalf of the Insurance Company to substantiate the plea, which was never pleaded, is liable to be ignored. At para 17 of the written statement extracted above, respondent no.7 had categorically pleaded that the time mentioned in the Cover Note to avoid his liability is not acceptable in view of the fact that proposal for issuance of insurance policy alongwith required amount was paid as early as on 15.3.94.

11. In ***M.A. Razak –v- United India Insurance Co.Ltd. and others*** (supra) it has been reiterated by this Court that in absence of any specific plea, the insurer cannot be permitted to adduce any evidence.

12. In ***Sripati Charan Mondal and another –v- Oriental Insurance Co.Ltd*** (supra) upon reference to Order VI, Rules 1 and 2 as well as Order VIII, Rules 2 and 3 it has been held by the Calcutta High Court that the question of fact by way of defence has to be specifically raised in the written statement or objection. It is also well known that the general or mere denial in the written statement is not sufficient and the denial must not be the evasive but specific and necessary.

13. In ***Mahipalpur Co-op. Society Ltd. –v- Smt. Prabhati and others*** (supra) it has been held by Delhi High Court that no amount of evidence can be looked into on a plea which has not been pleaded.

14. In ***Smt. Jhulan Rani Saha –v- The National Insurance Company and others*** (supra) it has been pointed out that though in many respects the Motor Accident Tribunal is free from technicalities of the C.P.C. and Evidence Act; but this does not mean that pleading need not be specific, clear and need not contain requisite pleas or data.

15. In the present case it was specifically pleaded by the claimants that the appellant-Insurance Company had issued Cover Note No.264117 to respondent no.7 in respect of the offending vehicle. Respondent no.7 pleaded that he paid money and submitted proposal for policy to the Insurance Company on 15.03.1994 and that the money receipt as well as Cover Note were not handed over to him till 17.03.1994. It was categorically alleged by respondent no.7 in his written statement that the time mentioned in the Cover Note to avoid its liability was not sustainable in the eye of law. On the face of such pleading Insurance Company did not plead at any point of time that respondent no.7 was not insured with regard to the offending vehicle at the time of accident. Insurance coverage was not denied specifically. Rather, written statement filed by the Insurance Company appears to contain evasive replies instead of specific denial. Therefore, it was not permissible under law to the Insurance Company to adduce evidence by examining OPW 1. Moreover, though OPW 1 stated in his

examination-in-chief that prior to receipt of policy amount under money receipt Ext.A, Cover Note was issued in respect of the offending vehicle on 16.03.1994, in his cross-examination it is admitted by him that before issuance of Cover Note policy amount is to be accepted. He also stated to have no personal knowledge as to when the Development Officer of the Insurance Company accepted the policy amount. In such circumstances, learned Tribunal is found to have rightly placed no reliance on the evidence adduced on behalf of Insurance Company. The Insurance Company has rightly been held to be liable to satisfy the award.

16. Before parting with this case it is felt pertinent to observe regarding the unsatisfactory nature of pleadings in the written statements usually filed by the Insurance Companies in most of the claim cases in the State. Written statements are filed pleading ignorance and lack of knowledge without ascertaining facts, particulars and data. Investigation is seldom made regarding averments made in the claim application before filing of written statement. It is desirable that officers entrusted with handling litigations should bestow utmost care to ensure that all material facts are pleaded in the written statements so that parties to claim proceedings would be aware of respective stands before adducing evidence.

In view of the above discussion, the appeal is dismissed.

Appeal dismissed.

2010 (I) ILR-CUT- 262

S.K.MISHRA,J.

TIKAN BINDHANI -V- STATE OF ORISSA.*

DECEMBER 7,2009.

CRIMINAL PROCEDURE CODE, 1973 (ACT NO.2 OF 1974) – SEC.374 & 386.

Criminal Appeal – Whether Sessions Judge can dismiss a Criminal appeal for default or for non-Prosecution.

Held, law does not envisage dismissal of an appeal for default or for non-Prosecution, but it only contemplates disposal on merit after perusal of the records. (Para 6)

Case laws Referred to:-

1.1996(4) SCC 720 : (Bani Singh & Ors.-V-State of Uttar Pradesh).
2.AIR 1987 SC 1500 : (Ram Narayan Yadav & Ors.-V-State of Bihar).
3.(2000) 18 OCR (SC) : 114 : (Rishi Nandan Pandit & Ors.-V-State of Bihar).
4.(1989) 2 OCR 448 : (Banchhanidhi Singh @ Nani Singh -V-State of Orissa).

For Petitioner – M/s.N.M.Praharaj & A.B.Parida.
For Opp.Party – Addl.Standing Counsel.

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*CRIMINAL REVISION NO.1232 OF 2009. From the order dated 16.09.2009 passed by Sri B.N.Mohanty, learned Addl.Sessions Judge, Mayurbhanj, Baripada in Crl.Appeal No.7/65 of 2008/2007, dismissing the appeal against the judgment dated 17.11.2007 passed by the learned Sub-divisional Judicial Magistrate,Baripada in G.R.Case No.118 of 2001 (T.C.No.869 of 2006).

S.K.MISHRA,J. Learned Addl.Standing Counsel receives notice on behalf of the State.

Heard.

Keeping in view the limited nature of the question involved, this Criminal Revision is disposed of at the stage of admission.

A short question arises in this Revision. Should the Sessions Judge dismiss a criminal appeal for default or for non-prosecution?

2. Petitioner was convicted for the offence under Section 47)a) of Bihar and Orissa Excise Act, 1915 and was sentenced to undergo simple imprisonment for two years and to pay fine of Rs.5,000/-, in default, to undergo further simple imprisonment for six months in G.R.Case No.118 of 2001 of the Court of J.M.F.C., Baripada. Against such judgment of conviction, the appellant preferred an appeal before the learned Sessions Judge, Mayurbhanj at Baripada. The Appeal was transferred to the Court of Addl.Sessions Judge, Baripada and numbered as Criminal Appeal No.7/65 of 2008-07. The case was called for hearing on 16.09.2009, but the appellant was absent and no step was taken on behalf of the appellant.

Learned Addl.Sessions Judge recorded that no steps have been taken for the preceding four dates. He held that the appellant is not diligent in prosecution of his appeal. Hence, he dismissed the appeal for non-prosecution by the appellant.

3. In ***Bani Singh and others v. state of Uttar Pradesh,*** 1996(4) SCC 720 the apex Court has held that the ratio decided by the two Judges Bench in ***Ram Narayan Yadav and others v. State of Bihar,*** AIR 1987 SC 1500 that the Court could only dismiss the appeal for default is erroneous. The three Judges Bench of the Apex Court in Bani Singh's case ruled that the plain language of section 385-386 does not contemplate dismissal of the appeal for non-prosecution simplicitor. Later the Apex Court in ***Rishi Nanda Pandit and other v. State of Bihar***,(2000) 18 O.C.R. (S.C) 114 followed the aforesaid principles and further held that it is a matter of prudence that the Court may, in an appropriate case, appoint a Counsel at the state's expense to argue for the cause of the accused. Of course it is for the court to determine, on a consideration of the conspectus of the case, whether it does or does not require such legal assistance. There can be appeals which could be disposed of unassisted by Counsel to put forth the favourable features for the accused. But if the sentence imposed by the judgment impugned in the appeal is of a substantial range it is advisable to seek the assistance of a legal talent.

4. Similar view has been taken in the reported decision of Banchhanidhi Singh alias Nani Singh v. State of Orissa,(1989)2 OCR 448, wherein this Court has held that when the Advocate for the appellant do not appear to argue the criminal appeal, learned Sessions Judge should have appointed a counsel amicus curiae to argue on behalf of the appellant. The learned Sessions Judge having not done so, in that case, this Court set aside the judgment dismissing the appeal.

5. G.R. & C.O. (Criminal) Volume-1 at Rule 65 sub-paragraph 4 clause (b) provides.

> "If an appellant in a Criminal Appeal pending before the Sessions Judge/Additional Sessions Judge/Assistant Sessions Judge has no means to engage an advocate or if an advocate appearing for him does not attend the court and does not argue when called on for hearing or submits a Memo of "no instruction", the Sessions Judge or the Additional Sessions Judge or the Assistant Sessions Judge, as the case may be, shall appoint an advocate amicus curiae to represent the appellant and dispose of the appeal after hearing him."
>
> (Emphasis supplied)

In clause © reads as follows:-

" The advocate amicus curiae so appointed shall be governed by the same terms and conditions which govern the State Defence Counsel appointed in a Sessions case under these Rules"

Thus, it is clear that the Hon'ble Court has directed in the G.R. & C.O. that whenever a criminal appeal is filed and the appellant does not appear, then the course open to the appellate court is to appoint an Advocate *amicus curiae.*

6. Law clearly empowers the appellate court to dispose of the appealonmerit and not merely on perusal of the reasons recorded in the trial court judgment, but by cross-checking all the evidences on record, reasoning and findings recorded by the trial court to find out, if they are consistent with the materials on record. Law, therefore, does not envisage dismissal of an appeal for default or non-prosecution, but only contemplates disposal on merit after perusal of the records. Therefore, the order passed by the learned Addl.Sessions Judge that non-appearance of the learned counsel for the appellant shows that the appellant is not diligent in prosecuting the Appeal entailing dismissal of the Criminal Appeal is clearly unsustainable in the eye of law.

7. Hence, the Criminal Revision succeeds. The order dated 16.09.2009 passed by the learned Addl.Sessions Judge, Baripada in Criminal Appeal No.7/65 of 2008/2007 is hereby set aside. The Appeal be restored to file. The Addl. Sessions Judge is directed to hear the appeal on merit by hearing the counsel engaged by the appellant and if the counsel does not appear, then provide legal assistance as provided in Rule 65 (4) (b) of the G.R. & C.O. (Criminal) Volume-1. The petitioner is directed to appear before the learned Addl. Sessions Judge on or before 06.01.2009 either through his counsel or personally. On such appearance, the learned lower court shall fix another date for hearing of the appeal.

The Criminal Appeal is accordingly allowed.

Appeal allowed.

2010 (I) ILR-CUT- 265

S.K.MISHRA,J.

ORISSA RURAL HOUSING DEVELOPMENT CORPORATION LTD.-V-RAJ KISHORE JOSHI.*

DECEMBER 4,2009.

NEGOTIABLE INSTRUMENTS ACT,1881 (ACT NO.26 OF 1881) – SEC.142(B).

Delay in filing complaint U/s.138 N. I. Act – Complainant has to satisfy the Court that he had sufficient cause by not making the complaint within the period prescribed – Like Section 5 of the limitation Act, the proviso to Clause (b) of Section 142 N. I. Act is a benevolent provision and has to be construed liberally.

In this case the complaint cases filed with a delay of 7 and 18 days respectively which is due to official process as an investigation was made by the vigilance Department in the petitioner-Corporation.

Learned trial Court committed gross illegality by not considering the matter of condonation of delay in its proper perspective and therefore has caused miscarriage of justice-He ld,delay condoned.

(Para 9)

Case laws Referred to:-

1.(1987) 2 SCC 107 : (Collector, Land Acquisition,Anantanag & Anr.-V- Mst.Katiji & Ors.).
2.(2005)3 SCC 752 : (State of Nagaland-V- Lipok Ao & Ors.)
3.2006(Suppl.)II OLR 724 (Govinda Chandra Sahu -V-State of Orissa & Ors.)
4.2007 CLR.8 : (Collector,Zone Officer, Upper Indravati Project -V-Harapriya Mishra & Ors.).
5.2007 (Suppl.)1 OLR 792 : (Managing Director, Woodburn Developers & Builders Pvt.Ltd.-V- Smt.Debamaya Panigrahi).

For Petitioner – M/s. A.K.Hota & S.K.Garia.

For Opp.Party – M/s.A.K.Mohapatra, N.C.Rout, S.K.Padhi, J.K.Behera & A.K.Mohapatra.

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*CRIMINAL REVISION NOS.997 OF 2006 & 978 OF 2006. From the orders dated 25.8.2006 passed by Sri D.Nayak, S.D.J.M., Bhubaneswar in I.C.C.Nos.901 of 2006 and 902 of 2006.

S.K.MISHRA, J. On consent of learned counsel for both the parties, the criminal revisions are taken up for disposal at the stage of admission.

2. In these Criminal Revisions, petitioners assail the orders passed by the learned S.D.J.M.,Bhubaneswar on 25.08.2006 in I.C.C. No.901 of 2006 and in I.C.C. No.902 of 2006, whereby he rejected the petitions filed by the complainant to condone the delay in filing the complain case under Section 5 of the Limitation Act, hereinafter referred to as “the Limitation Act”, read with

Section 142 (b) of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the Act").

3. Brief fact of the case of the complainant-petitioner is that Orissa Rural Housing and Development Corporation Ltd. had advanced the house-building loan to the accused-opposite party. There was an outstanding dues against the accused, for which he issued two account payee cheques of Rs.9,40,000/- each, on 28.10.2005 in favour of the complainant-Company drawn on Bank of Boards, Bhubaneswar. The said cheque was presented before the Syndicate Bank, ORHDC Extension Counter, Bhubaneswar for collection, but the complainant was intimated that the cheque has been dishonoured due to 'stop payment' and insufficiency of funds. Thereafter, the complainant on 4/5.01.2006 sent two demand notices to the accused in his address. The notices were received by the accused on 21.01.2006 and 14.01.2006 respectively, but the accused did not pay the amount due within 15 days of the receipt of the notice. Thereafter, the complainant initiated a complaint case on 23.03.2006.

The complainant filed applications under section 142(b) of the Act read with Section 5 of the Limitation Act. In such petitions, the complainants averred that due to official process and as an investigation was made by the Vigilance Department in the Orissa Rural Housing Development Corporation Ltd. there has been delay of 7 and 18 days respectively in filing these present complaints. The complainant further averred that the delay was not intentional. Hence, the delay be condoned, otherwise it will cause irreparable loss to the financial institution. The petitions were annexed with affidavits of the Assistant Accounts Officer of the Corporation.

4. Learned S.D.J.M.,Bhubaneswar, in the impugned orders held that no documents have been filed to believe the plea taken by the complainant. Hence, he rejected the petition for condonation of delay. Such order of refusing to condone the delay has been challenged in this Revision Application. In the Revision Applications, the Corporation has filed two letters dated 25.10.2005 and 27.10.2005 indicating that Vigilance enquiry was going on regarding sanction of Rs.51,35,000/- in favour of M/s. Duro Wires Pvt. Ltd.

5. In course of hearing of the application, learned counsel for the petitioner submits that a pragmatic approach should be adopted to condone the delay, whereas learned counsel for the opposite party very emphatically submitted that absolutely no ground has been made out for condoning the delay in this case. Hence, he submitted that the Revision application should be dismissed.

6. Section 138 of the Act provides for penalty for dishonour of cheque for insufficiency, etc. of funds in the account of the drawer. In clause (a) to the proviso of the section, it is provided that nothing contained in that section

shall apply unless the cheque has been presented to the Bank within a period of six months from the date, on which it was drawn or within the period of its validity, whichever is earlier. In clause (b) of the said proviso, it is further provided that Section 138 of the Act shall not be attracted unless the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque within 30 days of receipt of information by him from the Bank regarding the return of the cheque as unpaid. Clause (c) provides that such penal provision shall not be attracted unless, the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice. Section 142 of the Act provides that no court shall take cognizance of an offence punishable under section 138 except upon a complainat, in writing, made by the payee or, as the case may be, the holder in due course of the cheque, and that such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to Section 138. It is further provided that cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the court that he has sufficient cause for not making a complaint within such period. Admittedly, the cheque was dishonoured and intimated to the complainant on 24.12.2005. On 04/05/01.2006, the complainant sent demand notices as envisaged under section 138 (b) of the Act. One such notice was served on the accused on 14.01.2006, for which 1 C.C. No.902 of 2006 has been initiated. So the accused has the opportunity of making payment of the same within the next 15 days i.e. by 29.01.2006. For computing the period of 15 days, the day on which the notice was served on the accused has to be excluded. Therefore, in this case the cause of action as envisaged under section 138(c) arises on 30.01.2006. Thus, in this case the complaint should have been filed on or before 2nd March, 2006. But the complaint has been filed on 23.03.2006, which indicates that there is delay on 21 days. In I.C.C. No. 901 of 2006, notice was received by the accused on 21.01.2006. He was required to make the payment by 05.02.2006. Again he failed to do so. The complaint case should have been initiated on 08.03.2006. As the complaint case has been initiated or filed by 23.03.2006, there is delay of 14 days. The question that now arises, whether the complainant has shown sufficient cause for condoning such delay in filing the complaint. Section 5 of the Limitation Act, 1963, which is pari material with the proviso to Section 142 of the Act, provides that any appeal or application may be admitted after the prescribed period if the appellant or the applicant satisfies the Court that he has sufficient cause for not making the appeal or making the application within such period. This provision came up for consideration of the Hon'ble

Apex Court in the case, Collector**, Land Acquisition, Anantanag and another v. Mst. Katiji and others,** (1987) 2 S.C.C. 107. The Apex Court has held that it is common knowledge that the Apex Court has been makinga justifiably liberal approach in such matter instituted before it, but the message does not appear to have percolated down to all the other courts in the hierarchy. The Apex Court further observed that such a liberal approach is adopted on principles as it is realized that ordinarily a litigant does not stand to benefit by lodging an appeal late. Rather, he runs a serious risk. It is further held that refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated, as against this, when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. The Apex Court also ruled that a pedantic approach should not be adopted and the doctrine "Every day's delay must be explained" must be applied in a rational common sense pragmatic manner. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. Further, the Apex Court held that it must be grasped that judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so. In the said case, the Hon'ble Supreme Court has further observed that the doctrine of equality before law demands that all litigants, including the State as a litigant, are accorded the same treatment and the law is administered in an even-handed manner and there is no warrant for according a step-motherly treatment when the 'State' is the applicant praying for condonation of delay. The Apex Court further noted that in fact experience shows that on account of an impersonal machinery and the inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand though more difficult to approve. In any event, the State which represents the collective cause of the community, does not deserve a litigant-non-grata status. The Court, therefore has to be informed with the spirit and philosophy of the provision in the course of the interpretation of the expression "sufficient cause".

7. In State of **Nagaland v. Lipok Ao and others,** (2005) 3 S.C.C. 752, the apex Court has held that proof of sufficient cause is a condition precedent for exercise of the extraordinary discretion vested in the court. What counts is not the length of the delay but the sufficiency of the cause and shortness of the delay is one of the circumstances to be taken into account in using the discretion. In that case, the Apex Court has quoted a number of decisions of

that Court and approved the views expressed in the case of **Collector Ananta Nag** (Supra). The apex Court condoned a delay of 57 days in that case.

Learned counsel for the opposite party has relied upon several cases like **Govinda Chandra Sahu v. State of Orissa and others**, 2006 (Suppl.) II O.L.R. 724; **Collector, Zone Officer, Upper Indravati Project v. Harapriya Mishra and others,** 2007 C.L.R. 8; **Managing Director, Woodburn Developers & Builders Pvt. Ltd. v. Smt.Debamaya Panigrahi**, 2007 (Suppl.) I O.L.R. 792, wherein it has been held that delay cannot be condoned unless sufficient cause is shown.

7. Section 138 of the Negotiable Instrument Act, 1881 has been enacted to prevent misuse of the banking institutions and to promote business transactions through negotiable instruments. By providing punishment under section 138 of the act, the Parliaments have provided punishment for those persons who follow unscrupulous method of issuing cheques without intending to honour the same. Originally, that is, before the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002 came into force, there was no provision for condoning the delay in filing the complaint petition. However, keeping in view the complex nature of modern business practice, in which many a times, businessmen, traders etc. have to depend upon and have faith on others and for that reason and for other reasons, there may be delay in preferring the complaint. Therefore, the Parliament in its wisdom, perhaps, though to provide a saving clause in shape of the proviso to Section 142 of the Act, whereby the Court was given the discretion to take cognizance of the offence even after lapse of thirty days of the cause of action, as mentioned in Clause © of the proviso to section 138, if it is satisfied that the complaint had sufficient cause by not making a complaint within a period prescribed. In principle, the ratio laid down by the Apex Court with respect to Section 5 of the Limitation Act also applies to the proviso to Section 142 of the Act as in both the provisions, the expression “sufficient cause” appears. Like section 5, the proviso to clause (b) of Section 142 of the Act is a benevolent provision and it has to be construed liberally and as per the principle enunciated above.

Coming to the case in hand, it is undisputed at the state that the transaction on which the present opposite party representing M/s. Duro Wires Pvt. Ltd. is involved is under investigation by the Vigilance Department. It is also undisputed that the very high officers of the Corporation are under scrutiny of the vigilance Department and some them have been arrested. It is well known that such Government Corporations are also manned by public servants on deputation and otherwise. The principle applicable to the State is also applicable to such State owned Corporations.

Such Corporations also are categorized by impersonal machinery and inherited bureaucratic methodology imbued with the note-making, file-pushing, and passing-on-the-buck ethos, delay on its part is less difficult to understand. Such red-tapism and Vigilance enquiry resulting in delay is very easy to understand. Thus, taking a pragmatic approach, this Court comes to the conclusion that the learned trial court committed gross illegality by not considering the matter of condonation of delay in its proper perspective and therefore, has caused a miscarriage of justice.

8. In the result, the revisions succeed and the orders dated 25.08.2006 in ICC Nos.901 and 902 of 2006 are hereby set aside, the delay in filing the complaint is condoned and learned S.D.J.M.,Bhubaneswar is directed to take up the cases on merit. The petitioner is directed to appear before the learned magistrate on 06.01.2009.

Revision allowed.